

TOWARD AN ECOFEMINIST ENVIRONMENTAL JURISPRUDENCE:
NATURE, LAW, AND GENDER

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This thesis develops a legal theory reflecting the insights of feminism and environmental philosophy. I argue that human beings are not ontologically separate, but embedded in webs of relationality with natural others. My primary purposes are to 1) delineate ways in which institutions of modernity (such as law and science) have precipitated ecosocial crisis through the attempt to dialectically enforce mastery and control over nature and women; and 2) explore alternate political forms and ontologies which challenge the classical liberalist view of the (human) individual as a radically isolated, discrete, autonomous being. My overarching theme is that law functions as a narrative that can both hinder and enhance the promotion of ecological ideas, and how ecofeminism can contribute to transformative projects of environmental philosophy and feminist law.

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INTRODUCTION

In feminist and liberation theory, the misty, forbidding passes of the Mountains of Dualism have swallowed many an unwary traveler in their mazes and chasms. In these mountains, a well-trodden path leads through a steep defile to the Cavern of Reversal, where travelers fall into an upside-down world which strangely resembles the one they seek to escape. Trapped Romantics wander here, lamenting their exile, as do various tribes of Arcadians, Earth Mothers, Noble Savages and Working-Class Heroes whose identities are defined by reversing the valuations of the dominant culture. Postmodernist thinkers have found a way to avoid this cavern, and have erected a sign pointing out the danger, but have not yet discovered another path across the mountains to the promised land of liberatory politics on the other side. Mostly they linger by the Well of Discourse near the cavern, gazing in dismay into the fearful and bottomless Abyss of Relativism beyond it. The path to the promised land of reflective practice passes over the Swamp of Affirmation, which careful and critical travelers, picking their way through, can with some difficulty cross. Intrepid travelers who have found their way across the Swamp of Affirmation into the lands beyond often either fall into the Ocean of Continuity on the one side or stray into the waterless and alien Desert of Difference on the other, there to perish. The pilgrim's path to the promised land leads along a narrow way between these two hazards, and involves heeding both difference and continuity.

—Val Plumwood, *Feminism and the Mastery of Nature*¹

This thesis conducts a postmodern inquiry into the ways that the law serves as a discursive arena wherein the subordination of women by men

¹ Val Plumwood, *Feminism and the Mastery of Nature* (New York: Routledge, 1993), p. 3.

and the domination of nature by humans intersect. The first three chapters of this investigation operate on the level of theory, which is to say that they analyze how the modernist ideologies of capitalism, Cartesian epistemology, Newtonian/Baconian science, resourcism, and political liberalism underlie and inform law and legal institutions; and how these philosophical viewpoints foster distinct but related forms of domination. The fourth and final substantive chapter concludes with concrete examples of particular laws and policies which exemplify the theoretical prescriptions of the earlier three.

My inquiry is postmodern in the sense that it does not attempt to trade one foundational discourse for another. Rather, I ultimately agree with environmental political theorist Robyn Eckersley's suggestion that "ecofeminism [should] become a major and essential tributary of a general ecocentric emancipatory theory, rather than serve as *the* general emancipatory framework....[since any such theory] must be one that...does not privilege the concerns of any particular human emancipatory movement."² So while the thesis does argue that there are important conceptual similarities between the emancipatory projects embraced by ecofeminism and feminist legal theory, and that environmental law would greatly benefit from the conscious recognition of certain ecofeminist insights, it does not claim that ecofeminism *exclusively* possesses this ability to analyze the way that ecological destruction is perpetuated through law. Nor is it my claim that other environmental philosophies do not share ecofeminism's perspective of a fundamental human/nature relationality. Nonetheless, the thesis *does* argue that any attempt to deal with either the problem of women's

² Robyn Eckersley, *Environmentalism and Political Theory: Toward an Ecocentric Approach* (Albany: State University Press of New York, 1992), p. 70.

oppression or the fact of environmental degradation without drawing on ecofeminist theorizing is inadequate. It would be inadequate because, as has been well established in the literature, the subordination of women and nature are historically and conceptually twinned,³ and connected to the injustices of racism, cultural imperialism, classism, and speciesism as well; therefore uncovering the roots of the environmental crisis entails dealing with these “sister” manifestations of oppression too.

This thesis is also postmodern in that it promotes an anti-foundationalist method for thinking about environmental law that has few analogs within contemporary culture. My final sections only go so far as to identify promising areas where the traditional approaches to environmental law are being revisioned in ways consistent with an ecofeminist environmental jurisprudence; I do not present a well worked-out legal framework or set of principles that can be applied on a case-by-case basis. This is for at least two reasons. One is that this is an area of inquiry that is only just beginning; more consideration needs to be given to the way that law can better serve the emancipatory interests of women and natural entities; and it should be realized that this thesis hopes to someday become a dissertation which makes a significant contribution to the theoretical construction of such a project. The other reason is perhaps more important. Feminist political philosopher

Alison Jaggar in her book, *Feminist Politics and Human Nature*,⁴ observes

³ It has been pointed out that there is some ambiguity regarding the spelling of this word, the word could be “twined” in the sense of twisted together, or it could be “twinned” in the sense of a member of a closely-related pair. Although my original intention is “twinned”—a member of a pair, it occurs to me that these oppressions must be members of a fraternal and not identical set, gestated in the same cultural womb, nurtured together, and originating from the same conceptual genealogy, but with different dispositions, outlooks, and capable of reproducing a different memetic (as opposed to genetic) code. Both meanings work however.

⁴ Alison M. Jaggar, *Feminist Politics and Human Nature*, (Totowa, NJ: Rowman & Littlefield, 1983).

that feminist political theory is by nature ongoing; it recognizes that different political structures, policies, and assumptions will be less or more appropriate depending on changing historical conditions that are *themselves* shaped by laws and policies. Thus political theory is always “becoming,” and must acknowledge its own historicity and locatedness within specific social circumstances. When cultural forms and expressions shift, legal theory necessarily will too. But it should be acknowledged that changes in law cause those things collectively known as culture—values, beliefs, practices, customs— to change as well. For this reason law and the theories that inform it are never static, and thus an inquiry such as this one is necessarily incomplete.

Finally, the thesis is postmodern in that it views law narratively, as a carrier of cultural stories which, although perhaps never “true” in an absolute sense, become the texts upon which we must rely to interpret and interact with the world. So this project is fraught with uncertainty and indeterminacy, and may be surpassed or supplanted by alternate methodologies that repudiate altogether the at least small measure of “playing within the system” that my argument advocates. Nevertheless, I believe that it is important to embark on such a project as this one so that at this historical moment we may use law as a critical tool with which to dismantle the structure of capitalist patriarchy and at least construct a scaffolding upon which to hang the fabric of a healthier earth house.

CHAPTER 1

THE POWER AND THE PROMISE OF AN ECOFEMINIST POLITICAL ONTOLOGY: FEMINISM, ECOFEMINISM, AND THE LAW

I will begin with the following definitions:

Feminism can be broadly understood as the general agreement that A) Sexist oppression exists and B) Should be eradicated.⁵

Jurisprudence is the philosophy of law; it is the study of the theories and normative values contained in and instantiated by particular legal codifications. It is also, according to feminist jurisprudentialist Catharine MacKinnon, “a theory of the relation between life and law.”⁶

Environmental Ethics is a newly-emergent branch of philosophy which attempts to understand what constitutes an ecologically and ethically appropriate relationship between human beings and the natural world.

Ecofeminism is a field bridging Environmental Ethics and Feminism which seeks to explore the conceptual connections between environmental degradation and sexist oppression.

In this chapter I explore political forms which might emerge at the juncture of environmentalism, feminism, and law. The term “political forms” refers to ways of conceptualizing the relationship between political institutions and the way we live our lives. From here, we can begin to establish the tenets of a legal theory which reflects the insights of both feminism and environmental philosophy. This theory might be termed an

⁵ This is an approximation of Karen Warren’s definition in her landmark piece, “The Power and the Promise of Ecological Feminism” (*Environmental Ethics* (1990) Vol.12, No. 2:125-146).

⁶ Catharine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press 1989), p. 238.

ecofeminist environmental jurisprudence . There is already a broad body of works which deal with the topic of feminist jurisprudence, the intersection of feminism and law; however, there is considerably less literature which attempts to translate the underlying assumptions regarding the relation of human beings and the natural world expressed by ecofeminism into our legal institutions and thereby into political reality. Thus my intent is to first make explicit the connections between the fields of feminist jurisprudence, environmental law, and ecological feminism. By elucidating points of conceptual congruencies among these three disciplines, I intend to demonstrate that there is a serious need for scholars in these seemingly disparate fields to conjoin forces and address the ways in which gender, race, class, *and* ecological oppression are entangled— with a view to ending them all.

Feminist Jurisprudence and the Masculinism of Liberal Law

Since around the 1970s feminism has made important contributions to Anglo legal theory by revealing the ways in which legal discourses and the institutions they uphold are particularly masculinist, thereby creating and reinforcing gender inequality in society. Feminist legal scholars have exposed key assumptions about human nature contained by law, assumptions that are basic to the general liberalist ontology upon which law in western culture is founded. Liberal political philosophy of the sort which characterizes the vast

majority of American political thought⁷ carries and reproduces the belief that human society is comprised of discrete and isolated individuals, relating only externally and more or less at will, who because of their atomistic individuality possess certain economic and personal entitlements which can be expressed and defined through political forms such as rights-talk and social contract theory. This belief I will call the *thesis of ontological separatism*, because it holds that humans are essentially separate from one another and especially from the more-than-human-world.⁸

Although the feminist criticism of law is richly varied and complex (and this chapter will address some of its most important theoretical positions), its primary claim is that underlying the law as it is usually justified and practiced is a normative concept of rationalism which privileges and reifies a belief in epistemic and moral universality and objectivity.⁹ This, say feminists, is a *male* viewpoint, not one universally true of human beings. In fact, it directly excludes the perspective of women,¹⁰ who instead tend to experience

⁷ Such philosophy is epitomized in the works of Locke, Hobbes, Hume, and Rousseau, who each claim (although they reach different conclusions) that the individual is prior to the community or the state, that humans possess a pre-cultural essence that includes the exclusive ability to think and act according to one's own "rational self interest." See generally ed., James P. Sterba, *Social and Political Philosophy: Classic Western Texts in Feminist and Multicultural Perspectives* (Belmont, CA: Wadsworth, 1998).

⁸ Chapter 2 will discuss how socialist feminism confronts this ontological fallacy and replaces it with a more inclusive conception of the human/nature relation.

⁹ Catharine MacKinnon states that it took a feminist perspective on law to expose "a relation between one means through which sex inequality is produced in the world and the world it produces: the relation between *objectification*, the hierarchy between self as being and other as thing, and *objectivity*, the hierarchy between the knowing subject and the known object. Epistemology and politics emerged as two mutually enforcing sides of the same unequal coin" (*Toward a Feminist Theory of the State*, p. xi, emphasis added).

¹⁰ For critiques of scientific positivism and fruitful deconstructions of the concept of epistemic objectivity—the notion that the knower is a singular, detached, neutral spectator separated from the object of knowledge and whose perspective is sufficiently universal that it can be accessed undistortedly by any other epistemic agent—, see generally *Feminist Epistemologies*, eds., Linda Alcoff and Elizabeth Potter (New York: Routledge, 1993); especially Lorraine Code's article, "Taking Subjectivity Into Account."

themselves as situated in the world contextually and relationally. This perspective I will call the *thesis of ontological embeddedness*. Drawing from a vast array of feminist scholarship,¹¹ feminists are able to effectively demonstrate that while men tend to understand themselves as fundamentally separate from others, women tend to view themselves and form their identities in terms of their relationships and connectedness to others. Thus one of the main goals of feminist legal theory is to explain this difference¹² in the way that women and men experience themselves in the liberal state, and to persuade legal institutions that they will be more just and socially efficacious if they take account of the particularities which make up women's (and men's) experience.

Feminist jurisprudentialists argue that utilizing what I am calling the thesis of ontological embeddedness would produce a better and more inclusive model for legal decision-making than the current legal standard of applying abstract and depersonalized legal rules, which are considered "fair"

¹¹ The seminal work in this respect is Harvard social psychologist Carol Gilligan's *In a Different Voice* (Cambridge: Harvard University Press, 1982). Although this work has been criticized for perhaps reinforcing the stereotypical notion that women are "naturally" selfless, caring, and nurturing, this work and others which stem from its investigations into the differences between male and female perceptions of morality remain central to most feminist explorations and arguments for a reconceiving and revaluing of the concepts traditionally associated with femininity. Gilligan's concept has come to be called an *ethic of care*, and has been widely used by ecofeminist and non-ecofeminist theorists alike. Other important works include Dorothy Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements and Human Malaise* (New York: Harper & Row, 1977); and Nancy Chowdrow, *The Social Reproduction of Mothering* (Berkeley: University of California Press, 1978).

¹² Much has been and continues to be written on the question of whether this difference between women's and men's experience of the self is "natural"; i.e. biologically based, or is "cultural," meaning inculcated by society. I take the stance that while there may be some biological basis for women feeling connected to concrete others, the experiences which encourage this, such as care-giving, bodily labor, physical intimacy, maintenance of the body through cooking, cleaning, and nurturance are not inaccessible to men except insofar as society does not deem this work appropriate for the male gender. Thus men's bodies too contain this "essential" capacity for the experience of interconnection.

simply because they purport to be neutral and universalizable. The problem, say feminist scholars, is that such formulas (based on what is called an “ethic of justice”) ignore legally-relevant difference, especially difference that is itself constructed by unequal social relations,¹³ and assume that all “normal” experience is congruous with the experience of the “average” white, educated and socially privileged male. Thus the viewpoint that claims to be the view that all reasonable person’s would agree upon (it is telling that this has until recently been called the “rational man” standard), is in actuality privileging the perceptions and social reality of dominant groups.

Ecofeminism and Beliefs About Human Nature

In a manner analogous to the feminist challenge to the notion that human beings are fundamentally separate from one another, ecofeminists and other environmental ethicists challenge the assumption that human beings are fundamentally separate from the rest of nature. In doing so, ecofeminists have simultaneously attacked the conceptual notion of a natural

¹³ The penultimate example of this occurs within rape and sexual-harassment law, where it is precisely because women within patriarchal society are perpetually vulnerable to sexual victimization (MacKinnon argues that this is a large part of the definition of “woman” itself), that women need legal protection, and yet the law, fixated on enforcing an abstract notion of neutrality, is unable to provide the needed protection because to interpret the law from the perspective of the harassed, the violated, the terrorized—that is, to see things from a woman’s perspective—would be, according to traditional jurisprudence, “biased” and thus “unjust” (see generally MacKinnon, Ch. 9).

hierarchy¹⁴ of beings, a notion which has conveniently served to posit humanity as ontologically and morally primary. In a manner similar to the way that men in patriarchal culture view themselves as superior to and thus entitled to subjugate women, human beings view themselves as superior to the other-than-human environment. This, according to environmental ethicists,¹⁵ is the problem of *anthropocentrism* — seeing the world from a human-centered point of view and believing persons to be superior to or “above” nature. What I am suggesting here is that there are profound similarities between the masculinist (or *androcentric*) viewpoint of law and the anthropocentrism which riddles our value systems, and that eradicating the multiple structures of oppression requires that a jurisprudence be constructed which addresses gender and environmental issues simultaneously. Ecofeminism, because it argues that there is no way to escape

¹⁴ Regarding the notion of hierarchy in relation to ecology and feminism, Judith Plant remarks that, “Within human society, the idea of hierarchy has been used to justify social domination; and it has been projected onto nature, thereby establishing an attitude of controlling the natural world. The convergence of feminism with ecology is occurring because of an increasing awareness that there are, in fact, no hierarchies in nature. A belief in the virtues of diversity and nonhierarchical organization is shared by both views.” (Judith Plant, “Searching For Common Ground: Ecofeminism and Bioregionalism” in eds., Irene Diamond and Gloria Feman Orenstein, *Reweaving The World: The Emergence of Ecofeminism* (San Francisco: Sierra Club Books, 1990), p. 156). I want to be careful here to point out that when I use the terms “hierarchy” and “hierarchical” I am not referring to the specialized use of the term that occurs within the discourse of scientific ecology, which posits a model of relations between biological entities and their components that identifies multiple levels or scales at which natural systems can be viewed (atoms, cells, organs, organism, species, habitat, bioregion, and so on). This use of the term hierarchy in this sense does not imply that any level contains a greater value than any other, it simply points out that what we can witness is affected by our frame of reference. Such usage may actually provide a check on anthropocentrism. My use of hierarchy is in the ordinary sense of considering some things to be superior to other things, that are hence assumed to be less morally valuable.

¹⁵ For a discussion of the anthropocentric/non-anthropocentric distinction in ecophilosophical literature, see generally: Tom Regan, “The Nature and Possibility of an Environmental Ethic” (*Environmental Ethics* Vol. 3, No.1 (1981):19-34); Holmes Rolston III, “Is There an Ecologic Ethic?” (*Ethics* 85 (1975):93-109); J. Baird Callicott, *In Defense of the Land Ethic* (Albany: SUNY Press 1989).

anthropocentrism without also overcoming androcentrism, is the discourse through which this project can best be extended. Feminist jurisprudence would, on this account, benefit from exposure to the insights of ecofeminism. Concomitantly, constructing a transformative environmental jurisprudence will require that attention be paid to the ways in which gender oppression focuses and spreads harms to the natural world.

Feminism and the Thesis of Connection

In order to understand the connections between feminist legal theory and ecofeminism we must ask what it means to say that men perceive themselves to be essentially separate from others, whereas women tend to experience the self in terms of a connectedness to other beings. As stated in the previous section, the presuppositions of traditional western philosophy are closely related to the Cartesian mind/body dualism identified by many environmental philosophers as contributing to ecosocial crisis.¹⁶ These assumptions hold that society is merely a collection of discrete, autonomous individuals who are able to function and make choices freely without regard to the material and existential position of others. Law Professor Robin West calls this the “separation thesis” about what it means to be a human being: it is the notion that human beings are physically separate from other human and non-human beings, and that “the referent of ‘I’ is singular and

¹⁶ Cartesian dualism asserts that the mind and the body are two entirely separate substances, and that nature is something different from and outside of human beings; mere “automata” without consciousness or volition, and is thereby an external, dead sink of resources available for exploitation. For discussions of Cartesian dualism and repudiation of the (female-identified) body and nature, see Elizabeth Spelman, *The Inessential Woman* (Boston: Beacon Press 1988) and Val Plumwood, *Feminism and the Mastery of Nature*. Chapter 2 will also discursively employ the related concept of what Alison Jaggar identifies as “normative dualism.”

unambiguous, [it is] the claim that the word *individual* has an uncontested biological meaning, namely, that (whatever else we may be) we are...individuals 'first'." ¹⁷ Of course, such individuals may *choose* to be concerned with the welfare of others, and indeed may be morally obligated to do so under traditional Kantian moral doctrines, but the assumption remains that persons are ontologically disconnected from one another in such a way that they are existentially, epistemologically, and morally independent. According to the separation thesis we develop our thoughts and formulate our actions subjectively and internally, unbound by and unconcerned (except as we willingly choose to be) with the experiences and viewpoints of others.

One of the fundamental projects of feminism has been to challenge this notion that the experience of individuation or separation is as central to women's self-identity as it is to men's. Feminist researchers have documented the way in which girls from an early age are conditioned to understand themselves in terms of their particular connections to other family members. ¹⁸ As Carol Gilligan states, "women define their identity through relationships of intimacy and care." ¹⁹ They are likely to form an identity based on their *relationship* to another as, say, daughter or sister, and later, partner and mother; thus women's selves are defined and known by the existence of others with whom they stand in relationship. This culturally enlarged capacity for intersubjectivity both allows for an increase in empathy and a sense of connection with others *and* decreases the need for rationalistic, universal, abstract moral and legal rules which presuppose the

¹⁷ Robin West, "Jurisprudence and Gender" in *Feminist Jurisprudence*, Patricia Smith, ed. (New York: Oxford University Press, 1993), p. 493.

¹⁸ See note 11.

¹⁹ Carol Gilligan, *In a Different Voice*, p. 164.

atomistic individual “fighting for his rights” against the Hobbesian aggresses of another. Thus feminist political and legal theorists have critiqued conventional political doctrines that are influenced by and dialectically help to create a world in which the fundamental ontological, moral and epistemological unit is an independent, rationally self-interested individual human being (who is paradigmatically male), and instead have suggested that at least half of the human population experiences its participation in society and the world in terms of a shifting web of relations in which one’s needs and interests are changing and negotiable rather than fixed and concrete. The reasons for and implications of this sense of connectedness for political theory I elaborate on more deeply in the next chapter.

Feminism, Law, and the Critique of Objectivity

The general feminist emphasis on the contextual nature of experience and existence and the conscious recognition that human beings, women and men, exist in richly varied circumstances and thus exhibit a multiplicity of points of view²⁰ forms the cornerstone of feminist legal theory. Law serves as an institutionalizer and mediator of intra- and trans-human relationships. Feminism, when applied to law, argues that it is essentially “male” in that it is rational, rule-oriented, abstract, and attempts to apply its determinations

²⁰ Responsible feminists are usually careful to point out that there is no “one” feminist perspective, no single, official party line beyond what was noted in the introduction as the agreement that women are oppressed *qua* women, that this is wrong, and should be rectified. Says Rosemarie Tong, in the introduction to her book *Feminist Thought: A More Comprehensive Introduction* (Boulder: Westview Press, 1998, p. 8), “...I am painfully aware that I do not speak for ‘woman’, for feminists, or for any wider circle at all. I speak out of a specific background of experience, as do we all...” This statement resonates with the feminist injunction to “claim your bias” and also supports the contentions of those who say that those in the masculinist tradition who claim or imply any sort of objective neutrality are in actuality acting out of a particular world view.

impartially, based on the assumption that in order for a law (or The Law) to be fair it must be universalizable. “Equals must be treated equally” is one of the general maxims of law in the liberal state, a formulation which disallows for circumstantial considerations and erases the fact that all human subjectivities are positioned differently in the matrices of culture and history. The goal of law is to disregard difference; instead it searches for commonality, how a person or case is similar to others and thus can be said to be governed according to the same sort of rule as binds another. When judges and courts cannot find this point of commonality, or when women’s experience is too alien for a masculinist court to understand, the interests of the “other” become invisible, and the law does not function as an adequate forum for addressing the harms which occur to women. The well-known feminist jurisprudentialist Catherine MacKinnon puts it this way:

Many readers [of feminist or standard treatises on jurisprudence] (in the Kantian tradition) say that if a discourse is not generalized, universal, and agreed-upon, it is exclusionary. The problem, however, is that the generalized, universal, or agreed-upon never did solve the disagreements, resolve the differences, cohere the specifics, and generalize the particularities. Rather it assimilated them to a *false universal that imposed agreement, submerged specificity, and silenced particularity*. ²¹

MacKinnon, referring to the threat felt by men and others who are holders of social privilege when confronted with such a liberatory analysis of law, then goes on to say that

²¹ MacKinnon, *Toward a Feminist Theory of the State*, p. xv (emphasis added).

the anxiety about engaged theory is particularly marked among those whose particularities formed the prior universal. What they face from this critique is not losing a dialogue but beginning one, a more equal and larger inclusionary one. *They do face losing the advance exclusivity of their point of view's claim to truth —that is, their power . And we continue to talk about it.*²²

In accordance with MacKinnon's suggestion, then, it is the goal of this thesis to talk about it, so that our collective dialogue can truly begin to incorporate the voices of the many that are marginalized and excluded by traditional legal and philosophical discourses.

Law as a Patriarchal Structure

At this point we can now discuss more explicitly the feminist claim that the law is patriarchal; that is, it arises out of and legitimates a particular historically and cross-culturally ubiquitous hierarchal social structure that, among other things, subordinates women to men.²³ Patriarchal thinking privileges the male perspective, and imagines that that which is posited as “the other” exists primarily and perhaps solely to serve the male. (Not incidentally, it is males who under this view are the only ones accorded meaningful subjectivity). From the blatant denial of women's full humanity issued by Aristotle to the more subtle suggestion of Lawrence Kohlberg, Gilligan's mentor, that women are ethically inferior because they often “fail” to reach the “highest” stage of moral development, women, women's epistemic perspectives, and women's experiences have been systematically

²²Ibid., pp. xv-xvi (emphasis added).

²³ Patricia Smith, *Feminist Jurisprudence*, p. 3.

marginalized and denigrated in western patriarchal culture at the same time as such male-identified traits as rationality and impartiality have been hammered into the social scaffolding as the ideal and the norm. Additionally, patriarchy as a social structure is modeled upon a notion of rigid hierarchies which are thought to exist in nature and culture.²⁴ And finally, patriarchal thinking, according to most feminists, imprints onto experience what are called “false dualisms,” including the dichotomies of male/female, white/”colored”, public/private, mind/body, culture/nature, and self/other.²⁵

Patriarchy values aggression, and maintains its hegemonic power through force and coercion, often represented by and acting on behalf of the state. Law is the legitimating discourse which the state (manifesting liberalist/capitalist values)²⁶ uses to enforce its point of view—a point of view which oppresses women (and, I shall soon begin arguing, nature as well). Again MacKinnon is helpful on this point:

²⁴ See note 14.

²⁵ Lying at the heart of feminist debates of all sorts are discussions of *dualism*: conceptual pairings which posit radical separation as well as radical opposition between members of a disjunct, privileging one side while simultaneously subjugating it's companion. Although specific entities are not actually as fixed into rigid categories as this formulation might imply, feminist writers find that such dichotomies as male/female, reason/emotion, abstract/concrete, transcendent/material, culture/nature, mind/body, and human/animal nevertheless tend to appear frequently within this process. These pairings are, as Nancy Hartsock notes, “overlaid by gender” (Hartsock, “The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism” in eds., Sandra Kemp and Judith Squires, *Feminisms* (Oxford: Oxford University Press, 1997), p. 159.) in such a way that the first member gets associated with maleness and masculinity and casts as subordinate the female-identified second. According to many feminist theorists, dualism is the process by which “difference gets construed as domination,” suggesting that dualistic thinking depends on notions of dominance and superiority in which gender and sex become sites of struggle for social and institutional power. Dualistic thinking under this definition can also be thought of as the process by which the social conditions necessary for the multiple varieties of oppression characterizing the present historical moment are reproduced.

²⁶ The ways in which dominant views of human nature as being fixed and rigid as well as ontologically separate from nature and human praxis serve to perpetuate the goals and interests of the global capitalist elite at the expense of women and other disadvantaged groups will be discussed more extensively in Chapter 2.

In liberal regimes, law is a particularly potent source and badge of legitimacy, and site and cloak of force. The force underpins the legitimacy as the legitimacy conceals the force.... In male supremacist societies, the male standpoint dominates civil society in the form of the objective standard—that standpoint which, because it dominates in the world, does not appear to function as a standpoint at all. Under its aegis, men dominate women and children [and nature].... Family and kinship rules and sexual mores guarantee reproductive ownership and sexual access and control to men as a group. Hierarchies among men are ordered on the basis of race and class, stratifying women as well. The state incorporates these facts of social power in and as law. Two things happen: law becomes legitimate, and dominance becomes invisible.²⁷

To summarize the discussion to this point, then, feminist jurisprudence helps us to appreciate that the law, like western philosophy as a whole, is predicated on a deep belief in the ontological separatism of the individual who possesses a proverbial “bundle of rights” which protects *him* from the other social atoms “pinging” about in the liberal state. But the experiences of women, when given authentic voice, belie the official proclamation that human beings are first and foremost separate, apart and disconnected from other beings in the world. Instead, women’s experience reveals a dimension of human existence that knows itself to be deeply embedded within a matrix of relations. Feminist jurisprudence also claims that law functions as a

²⁷ MacKinnon, *Feminist Theory of the State*, p. 236.

patriarchal institution²⁸ by operating out of and dialectically reinforcing a social hierarchy in which women, through the process of dualism, are thought to be and thereby are treated as though they are inferior to men. But what, then, might the world look like, and how might law function, in a world in which these sorts of damaging notions no longer held sway? And what other sorts of things must a feminist jurisprudence address if it is to truly and meaningfully break down the dualistic, non-contextualized patriarchal frameworks upon which women's oppression is founded? What can ecofeminism, an academic and experiential field which recognizes a powerful conceptual similarity between the oppression of women by men and the exploitation of the natural environment by humans, contribute to the project of feminist jurisprudence; and how could the social critique offered by feminist jurisprudence eventually translate into a political and social reality of the sort envisioned by ecofeminists?

Ecofeminism and Value-Hierarchical Thinking

In her landmark and much-anthologized piece, "The Power and the Promise of Ecological Feminism," ecofeminist philosopher Karen Warren discusses what she calls "oppressive conceptual frameworks."²⁹ According to Warren, an oppressive conceptual framework is way of viewing the world in which "reality" is stratified and ordered hierarchically in such a way that some being or entity (i.e. humans or men) are placed "above" and are entitled to exploit and/or disregard whatever is "below" (nature and women). Such systems depend on the "logic of domination," a root assumption that first of

²⁸ Patricia Smith, *Feminist Jurisprudence*, p. 3.

²⁹ Karen Warren, "The Power and the Promise of Ecological Feminism."

all there is indeed something which is “above,” and that whatever occupies this position is then entitled to physically/sexually/economically dominate whatever exists “below.” According to Warren and other ecofeminists³⁰ women and nature have both been conceptually linked with the realm of the physical, whereas men and maleness are assigned to that which is “mental,” “rational,” and/or “spiritual.” Study of the traditional western philosophical canon quickly reveals that whatever is physical or corporeal is considered base, fearsome, and deceptive; thus a perennial goal of philosophy, represented well by ancient thinkers as reputable and influential as Plato and Aristotle,³¹ is to “transcend” the physical in order to languish in the realm of pure, abstract thought. Any political, social, or cultural system which memetically carries and reproduces this belief in the essential dangerousness of nature and the feminine and the superiority of culture and masculinity must therefore suppress actual women and repudiate its ontological connections to material nature.

But to do this, to deny that we are embedded in and dependent upon the ecosphere, is, as the current ecological crisis reveals, acutely hazardous. Through our destructive industries and consumerist behaviors we imperil not only our own lives but the existence of millions of other entities on the planet. Because ecofeminism insists that there are deep connections between the social domination of women and the material degradation of nature, that

³⁰ See for example, Carolyn Merchant, *The Death of Nature : Women, Ecology, and the Scientific Revolution* (San Francisco: HarperCollins, 1983); also, Susan Griffin, *Woman and Nature: The Roaring Inside Her* (New York: Harper and Row, 1978).

³¹ For an extensive and deeply-researched treatment of the way in which Platonic Idealism and Plato's philosophy opposes nature to the human (thus leading to a view of human nature as alienated from the natural world), links women to the irrational and the inferior, and legitimates social relationships founded on the model of master/slave, see Val Plumwood, *Feminism and the Mastery of Nature* (London: Routledge 1993), pp. 69-103.

these are actually twinned manifestations of an oppressive patriarchal conceptual framework based on value-hierarchical thinking, ecofeminists contend that any attempt to end sexism must also address environmental issues, and simultaneously any self-consistent brand of environmental ethics must also be feminist. For instance, in a piece examining the content and implications of Warren's explication of the logic of domination entitled "Is Ecofeminism Feminist?," theorist Victoria Davion writes that

noticing these links allows us to recognize that the domination of nature by humans, and the sexist domination of women by men, rely on the same general framework. Thus, the projects are conceptually linked, and the overthrowing of this framework is *fundamental to both projects [the women's and environmental movements].*] This important insight shows that environmentalists should and must be allies, and makes explicit what it is we must work against. If one grants conceptual links between the domination of nature and the domination of women, it follows that a movement that is not feminist will yield at best a superficial understanding of the domination of nature, and a feminist movement that is not environmental will yield unacceptable results regarding nature. *Thus, those fighting to save the environment should, as a matter of consistency, be working to overthrow patriarchy, and those working to overthrow patriarchy should be fighting to save the environment.*³²

³² Victoria Davion, "Is Ecofeminism Feminist?" in ed., Karen Warren, *Ecological Feminism* (London: Routledge 1994), p. 11.

Ecofeminism and Feminist Jurisprudence

Since feminist jurisprudence also seeks to “overthrow patriarchy, ” if one accepts the basic contentions that first, historically nature has been feminized (think, for example, of the common expression “Mother Earth”), secondly, that women are believed to be “closer to nature,” and finally, that their common oppression is related, then at a minimum, and “as a matter of consistency” feminist jurisprudentialists and those practicing feminist law ought to also be working on a legal level to eradicate the sorts of sexist and anthropocentric conceptions that cause environmental harm. But perhaps the link between ecofeminist theories and feminist theories of jurisprudence is even stronger than this. Earlier I suggested that these two positions are joined in opposing the thesis of ontological separatism, the belief that human beings are fundamentally separate, discrete, and autonomous. But whereas feminist legal theory stops at insisting that *people* (especially women), are as much connected as they are apart, ecofeminism extends this insight much further to include the non-human world; i.e. nature. Environmental ethicists, drawing on empirical information about our world from the science of ecology, recognize the biological fact that we live in webs of relationality to other creatures and processes in the biosphere, and ecofeminists know that women tend to experience themselves as fundamentally connected, and that this sense of connectedness is easily extended to the natural world. Like feminist jurisprudentialists, ecofeminists readily recognize that such moral and legal concepts as “rights” and “the social contract” often are inadequate or simply do not apply to those who’s experience is *not* one of atomistic individuality, such as children, or mothers, or animals and plants. It is here

that we can begin to see the bridge between and the deeper relatedness of these projects, due to ecofeminism and feminist law's shared critique of political forms that are predicated on the thesis of ontological separatism, such as rights. This conceptual similarity can be more easily demonstrated if we consider the problems that rights-talk poses for animal welfare discourse, an issue of tremendous importance for many ecofeminists. It is fruitful, therefore, to examine the debate concerning what is commonly called "animal rights" as a way of exploring more fully the need for the creation of political forms based on an ontology of embeddedness.

Ecofeminism, Animals, and the Feminist Critique of Rights

Animal liberationists Peter Singer and Tom Regan are probably the best known moral philosophers who have argued that animals have ethically meaningful interests that human beings are obligated to respect.³³ However, their work has been criticized by ecofeminists for failing to recognize the presuppositions of distinct individuality and moral universalizability that underlie their social-contractarian type of an attempt to accord animals moral standing. Much of this ecofeminist critique basically states the following: by arguing that animals ought not to be subject to cruel practices (such as laboratory experimentation, or being slaughtered for food) because of some trait(s) that animals supposedly *share* with humans (like subjectivity, or the ability to feel pain, etc.), Singer and Regan actually end up privileging the

³³Peter Singer, *A New Ethics for Our Treatment of Animals* (New York: New York Review, 1975); Tom Regan, *The Case for Animal Rights* (Berkeley: University of California Press, 1983).

very traits that are prioritized through value-hierarchical thinking.³⁴ In addition, ecofeminists say, such emphasis on the way that animals are *like* humans ignores one of the central tenets of feminist thought: the recognition of ontological, epistemological, and moral plurality, and the giving of “voice” to those that have been silenced by a hegemonic philosophy that has marginalized women, nature, and animals. Giving voice to the marginalized is also, incidentally, one of the projects of feminist jurisprudence.

Although most ecofeminists writing on the subject of animal welfare appreciate the efforts of Singer and Regan, and see themselves as allies, they decry these philosophers’ masculinist emphasis on reason as a means to derive “universalizable principles” which ought to govern human conduct toward animals. Instead, ecofeminists believe that persons ought to recognize the heavily contextual nature of the problem. Philosopher Deborah Slicer says that, “These mostly methodological considerations are not lost on Singer and Regan, but they [are seen as] superfluous.... But for many thoughtful people the question of *whether* animals should be used in research is more pertinently one of when they should be used and *how* they will be treated.... ” She continues later, “[T]here are numerous relevant issues that are neglected by both sides, including this one, *and there may well be more than just two sides* .”³⁵

Animal welfare ethicist Mary Midgley echoes this awareness when she argues that there are important differences in the needs, types of sensation,

³⁴ I am using this term in the way that Karen Warren uses it: to mean the recognizing of difference in a way that places greater emphasis and importance on one thing or entity while making the other subordinate.

³⁵ Deborah Slicer, “Your Daughter or Your Dog?” *Ecological Feminist Philosophies*, (ed., Karen Warren, Bloomington: University of Indiana Press, 1996.) (Last emphasis added).

cognitive capacities, and social tendencies between species, differences that morally inclined creatures such as ourselves are obligated to recognize and account for. The present approach, Midgley states, is to attempt to extend something called “rights” to a being who has no conception of what it means to be an individual in the liberal state.³⁶ The point she makes is that although humans and horses are minimally similar in that they both feel pain (and pleasure), it would be absurd to treat horses with *exactly* the same type of consideration given human beings to protect them from harms inflicted by another, making rights an ill fit. But a further ecofeminist point is that while we cannot completely empathize with other creatures, in other words we can’t know exactly what their experiences are, our interspecific biophilia³⁷ is sufficient to cause considerable sympathy toward the suffering of our fellow creatures, and it is this sympathy, experienced and expressed on an emotional level, which ought guide our moral codes regarding non-humans.³⁸ This is what feminists, drawing upon the notion introduced by Gilligan, mean when they argue that the moral *and* legal standard ought to be based on an “ethic of care” in which one’s *relationship* with, instead of separation from, others is valued.

Constructing an Ecofeminist Political Ontology

The criticism of conventional animal rights theories as overemphasizing

³⁶ Mary Midgley, “The Mixed Community” in *The Animal Rights/Environmental Ethics Debate*, ed., Eugene C. Hargrove, (Albany: SUNY Press 1992).

³⁷ *Biophilia* = literally, “love of life.” Coined by Harvard biologist E.O. Wilson, this term refers to the innate tendency of humans and other creatures to value their own and others’ life processes. (Edward O. Wilson, *Biophilia: The Human Bond with Other Species*, Cambridge: Harvard University Press, 1984).

³⁸ For another endorsement of this view, see John Fisher’s article “Taking Sympathy Seriously : A Defense of Our Moral Psychology Toward Animals” in Hargrove, *The Animal Rights/Environmental Ethics Debate*.

the capacity to reason can be shown to flow readily from feminist and ecofeminist positions: if one embraces an ontology of connectedness then rights language is not appropriate when applied to the moral interests of animals, or more-than-human natural entities, because the language of rights is predicated on the liberalist political ontology of atomistic individualism which supposes that we (all those morally relevant) are able to freely negotiate with other rational, self-aware individuals in regard to which of our “inalienable” rights we are willing to modify or forego in exchange for other benefits. Rights theories also tend to claim that rights are founded on the capacity for what Mary Anne Warren calls “moral autonomy.”

Moral autonomy is the ability to act as a moral agent, that is, to act on the basis of an understanding of, and adherence to, moral rules or principles.... [But] if moral autonomy...is a necessary condition for having moral rights, then probably no nonhuman animal can qualify.... But why, we must ask, should the capacity for autonomy be regarded as a precondition for possessing moral rights? Autonomy is clearly crucial for the exercise of many human moral or legal rights, such as the right to vote or to run for public office. It is less clearly relevant, however, to the more basic human rights, such as the right to life or to freedom from unnecessary suffering. The fact that animals, like many human beings, cannot *demand* their moral rights (at least not in the words of any conventional human language) seems irrelevant.³⁹

³⁹ Mary Anne Warren, “The Rights of the Nonhuman World,” in Hargrove, *Animal Rights/Environmental Ethics Debate*, p. 194.

The thrust of this objection is that it excludes non-humans from moral consideration because the other animals do not possess the type of being that would allow them to participate in political discourse,⁴⁰ presumably the only arena where rights are made meaningful. (There are attempts that have been made to overcome this objection, such as notions of legal guardianship, but these leave intact the idea that to have rights one—or one’s representative—must be able to articulate, assert, and “fight for” them.) Again, an appropriate response to this objection, say ecofeminists, would be an ethic based on what Carol Adams⁴¹ calls “embodied knowledge”—the metarational intuition that killing animals, without strong justification, is wrong; as opposed to an appeal to some depersonalized, rational, “neutral” principle of ethics founded on what many see as a flawed understanding of both human and animal nature.

Noted ecofeminist philosopher Val Plumwood shares this view that philosophies which present their ideas in a mode of discourse which privileges the masculinist valuation of the rational, abstract, and universalizable—modes which focus on “rules” that on a political level become “rights”—are part and parcel of what has led to ecosocial crisis.

Rights [such as “rights for nature”] seem to have acquired an exaggerated importance, and their status as ethical focus, as part of the prestige of the public sphere and the masculine, and the emphasis on separation and autonomy, on reason and abstraction. A more promising approach for an ethics of nature,

⁴⁰ Chapter 3 explores more fully ways in which the interests of natural entities can be dealt with politically.

⁴¹ Carol J. Adams, *The Sexual Politics of Meat: A Feminist-Vegetarian Critical Theory* (New York: Continuum, 1990).

and also *one much more in line with the current directions in feminism* , would be to remove rights from the center of the moral stage and pay more attention to some other, less dualistic, moral concepts such as respect, sympathy, care, concern, compassion, gratitude, friendship, and responsibility.⁴²

These sorts of considerations are “much less problematically extended” to nature than are concepts such as rights, claims Plumwood, because they view the self as, and here is my primary point, *embedded in relationships with others* , instead of either being radically separate or completely subsumed.

Animals, Politics, Sex, and the Relations of Domination

One further contribution of ecofeminism to the continued development and application of feminist political theory to environmental law is the insight that there are important ideological and theoretical connections between the domination and exploitation of animals for food, the domination and exploitation of women for sexual access, and the domination and exploitation of nature as an economic resource. What all of these share is that they represent a form of “power over;” that is, the forcible extraction of a benefit that accrues from the “object” (the woman, the animal, the environment) to the “subject” (the western white male). Since ecofeminist theory explores the connections between environmental and sexist oppression and seeks to expose the logic of domination common to both, any attempt to liberate animals without attention to ecofeminist claims, it is

⁴² Val Plumwood, “Nature, Self and Gender: Feminism, Environmental Philosophy and the Critique of Rationalism ” in *Ecological Feminist Philosophies* , ed., Karen Warren (Bloomington: Indiana University Press, 1996, p. 160), (emphasis added).

argued, is incomplete, and so is any environmental ethic. The ecofeminist position on animals fits closely with feminist jurisprudence's analysis of rape: when women (animals) are viewed as the rightful possession of men (human beings), it is difficult for a patriarchal society such as our own to understand what the harm is when they are exploited, or to even know that they are. The law treats women as if they are objects available for sexual access and economic exploitation (feminists have shown that these are often interconnected through the basic institutions of society such as marriage and motherhood), and it markets them through pornography and advertising as objects of consumption. Likewise, society treats domesticated animals as though they are objects whose purpose is to be bred and consumed, and it treats nature as a sink of resources existing for the purpose of satisfying the ever-increasing material demands of human culture—a culture dominated by men and the values of patriarchy.

Toward an Ecofeminist Environmental Jurisprudence; or Ecofeminism Unmodified

MacKinnon writes that women are socially constructed to be weak, passive, unresistant to male power, that which is fuckable.⁴³ The state helps to maintain this social construction. One sentence in *Toward a Feminist Theory of the State* says, “Socially, femaleness means femininity, which means

⁴³ Concerning the link between scientific positivism, political liberalism and women's oppression, MacKinnon notes that, “Objectivity is the methodological stance of which objectification is the social process. Sexual objectification is the primary process of the subjection of women. It unites act with word, construction with expression, perception with enforcement, myth with reality. Man fucks woman; subject verb object” (*Toward a Feminist Theory of the State*, p. 124). MacKinnon further notes that “I know no nondegraded English verb that elides the distinction between rape and intercourse, love and violation, the way this term does (p. 252, note 2).”

attractiveness to men, which means sexual availability on male terms.”⁴⁴

Carolyn Merchant, in *The Death of Nature*, explains that because early medieval Europeans viewed nature and the earth as their “mother,” when the proto-machinery of the modern era began ripping ore from the hillsides in large-scale mining operations it was as though “she” were being raped. If ecofeminists are right that in the present patriarchal culture women and nature are inextricably linked, that nature is perceived of as essentially female and women are essentially natural (whereas men are cultural) and both then, are of course known to patriarchal epistemology as the “other,” then in terms of an ecofeminist environmental jurisprudence MacKinnon’s sentence might read: “Culturally, nature is female. Socially, femaleness means femininity, which means attractiveness to men, which means sexual or economic or material availability on patriarchal terms, which means that nature is both feminine and attractive because we have made sure through the logic of domination to culturally construct nature as weak and passive and available/exploitable/violable on male terms.”

The value of such a comparison is that it explicitly links the sorts of ecological harms perpetuated by the human species to the sorts of harms visited upon women by the state when it is dominated by patriarchal values, thereby enabling feminists and others interested in ending the injustices of oppression to better understand the political ideologies with which they grapple. When it is recognized that what lies at the root of environmental degradation is a set of historical values and beliefs that have conceptually located human beings as the overlords of nature, it can be readily seen that to

⁴⁴ Ibid, p. 110.

place women in a similar subservient position is both logically consistent and existentially dangerous. If through our collective and personal actions both “large” (our political institutions, modes of discourse) and “small” (our purchasing decisions and the foods we choose to eat) humans continue to behave as though literally *everything* else is here *exclusively* for the satisfaction of our capitalistically-distorted wants, then we are contributing to the unsustainability of the earth’s life-processes, endangering our own selves, and immorally contributing to the demise of others. This is where feminism *and* ecofeminism become so useful, for they tell us that our ethics serve us best when they are narratized and contextual, not universalistic and abstract. They are useful because *we* are storytelling culture-dwellers, embedded in context, and intricately and inextricably tied to one another and all of material nature. We exist in relationship, with other humans, with animals, with nature, and our interest in survival is tied to the survival of other participants in this world’s processes in a way strikingly similar to the manner in which men’s flourishing is tied to the liberation of women.

Feminist Jurisprudence and Ecofeminism: Making Connections

Just as feminist jurisprudence sees patriarchy as the root source of social injustice and most, if not all, social problems (including poverty and violence), ecofeminism sees patriarchy as at the root of all environmental problems. Thus these two doctrines share a similar point of analysis. So the minimal connection between ecofeminism and feminist jurisprudence is that they share a critique of rights for the same reasons—rights are overly individualistic in their focus, when in fact persons are not ontologically

isolated and strictly rational. We exist in relation to others, including nature. We live in a world populated by other beings. Law forms and informs our relationships with others, it defines who “counts” as being recognized. (The implications of this quality of law and legal institutions will be discussed further in chapter 3.) Thus, when the law does not recognize environmental problems as social problems, or addresses them with inadequate tools (such as rights language), it insinuates that nature, and what we do to it, does not matter, doesn’t count.

The discourses of feminist jurisprudence and ecofeminism both identify false dichotomies such as sameness/difference, public/private, male/female, mind/body as being flawed ways of understanding our problems, and both point out that such assumptions actually underscore the most damaging features of patriarchy. Presently, however, feminist jurisprudence only goes as far as identifying the way in which *human beings* have been falsely dichotomized. Ecofeminism agrees with this analysis, but recognizes one further, overarching dualism: the nature/culture split; or the assumption that human beings, male and female, fundamentally operate outside of nature. The ontology of ecofeminism suggests that we are embedded within the cultural/natural matrix, and it may be women’s unique epistemic position which allows for this recognition. While not an “essential” trait of women, at this juncture in historical reality, this ontological perception may well indeed be a “female” way of seeing things. “A jurisprudence,” offers MacKinnon, “is a theory of the relation between life and law. In life, ‘woman’ and ‘man’ are widely experienced as features of being, not constructs of perception, cultural interventions, or forced identities. Gender, in other

words, is lived as ontology, not as epistemology. Law actively participates in this transformation of perspective into being.”⁴⁵ Therefore if nature is perceived of as a dangerous, feminized other, then the law actually helps to make this so by dialectically reinforcing the conceptual framework of sexism and anthropocentrism upon which oppression is based. Thus one of the goals of an environmental jurisprudence founded on anti-anthropocentrism would be to examine the underlying assumptions regarding nature and the relation of human beings to it that are contained and instantiated by law, just as feminist jurisprudence looks at the underlying view of women that is normatively implied by law. Moreover, any environmental legal theory which truly wishes to put in place just and efficacious legal protections for nature must expose the underlying social presumption that nature is “dead,” “inert,” “an object” and valueless if considered non-economically. Only by working to end *all* forms of oppression, no matter how and where in society they manifest themselves, can the emancipatory goals of both feminism and the environmental movement be realized.

Conclusion

The sort of comparison that I have just conducted between the goals and analysis of ecofeminism and feminist legal theory is useful in deconstructing the conceptual roots of the logic of domination. We still need to explore what *alternate* political and legal models might be able to accomplish the joint goals of feminism and environmental ethics. However, there are a variety of feminisms, and not all share the critique of capitalist technologies and modes

⁴⁵Ibid, p. 237.

of production that I contend are crucial to dismantling the oppressive social and political institutions that perpetuate sexism and promote damage to natural systems. In the next chapter, I examine various feminist de- and re-constructions of political theory, focusing especially on critiques of liberal feminism and the endorsements of socialist feminism undertaken in the work of Alison Jaggar and Carolyn Merchant, as a way of exploring which aspects of recent feminist political theorizing might be most useful in contributing to the project of constructing an ecofeminist environmental jurisprudence.

CHAPTER 2

FINDING THEORETICAL GROUND: SOCIALIST FEMINISM AND AN ECOFEMINIST POLITICAL WORLDVIEW

Alison Jaggar and Feminist Political Criticism

In her book *Feminist Politics and Human Nature* ⁴⁶ political philosopher Alison Jaggar delineates four major versions of feminist thought—liberal, Marxist, radical, and socialist—and provides an account of each one's prescriptions for political change. Jaggar begins her discussion with liberal feminism, describing the assumptions about human nature from which it emerges and the way in which these presuppositions determine the style and direction of its remedies for gender-based social inequality. Because, as we have seen, law in the United States is heavily predicated on the basic assumptions of liberal political theory, and institutions and laws, including environmental statutes, are generally designed in such a way as to dialectically reinforce liberalism's fundamental suppositions about human ontology, this is an important and useful place to start. By examining the way feminist political thought appears through the lens of liberalism, we are able to grasp more deeply the way in which the contemporary legal narratives,⁴⁷ even when they attempt to address environmental issues, tend to reinforce

⁴⁶ Alison M. Jaggar, *Feminist Politics and Human Nature* (Totowa, NJ : Rowman & Littlefield, 1983).

⁴⁷ The notion of legal narratives having the potential to exacerbate or ameliorate environmental damage is developed in chapters 3 and 4.

rather than challenge anthropocentrism.

Liberalism and Liberal Feminism

Liberal feminism, like the general theory of liberalism from which it draws its inspiration, holds that human society is an aggregate of solitary, atomistic individuals, who possess a pre-social “essence” or “nature” that exists prior to their entrance into cultural and political life. This human essence is considered to be universal to all human beings, and is not thought to be affected by the social conditions which predominate in a particular era or age.⁴⁸ Rather liberals, and liberal feminists, take an ahistorical view of human nature, claiming that the uniquely human capacities for rationality and autonomous action are the defining features of a human being. These capacities are thought to be the traits upon which the intrinsic value of adult persons is founded, and leads to the call for “political egalitarianism,” the philosophical position that “if all individuals have intrinsic and ultimate value, then their dignity must be reflected in political institutions that do not subordinate any individual to the will or judgment of another.”⁴⁹ The basic position of liberal feminists, then, is that women are fundamentally autonomous, existentially and ontologically isolated individuals who are capable, like men, of rational thought and therefore ought to be permitted to participate in and be represented fully by traditional liberal institutions such as government, business, and law.

⁴⁸ This inattention to material and historical conditions puts liberal feminism sharply in contrast with Marxist and socialist feminism, which hold that social exigencies and the relationship of persons to the means of production not only influence what we call “human nature,” but actually create it. This will be further explained later in this chapter.

⁴⁹ Jaggar, *Feminist Politics and Human Nature*, p. 33.

Normative Dualism

An assumption critical to the development of liberal political theory is what Jaggar terms “normative dualism,”⁵⁰ a concept very similar to Karen Warren’s notion of value-hierarchical thinking.⁵¹ Exploring the ramifications this ontological and epistemological notion has had for the development of political theory will help to clarify the conceptual links between ecofeminist philosophy and feminist jurisprudence.

Normative dualism, like value-hierarchical thinking, is a particularly western conception that arises out of the work of historical figures whose ideas regarding human beings and the relationship of nature to culture have shaped the modern era: particularly such philosophers as John Locke,⁵² Thomas Hobbes, and Rene Descartes. Jaggar, like ecofeminists Carolyn Merchant and Val Plumwood, finds feminist significance in the fact that liberal politics (as well as modern science and capitalist economic theory, a not incidental or innocent development, as I show below) developed within a philosophical framework based on the radical dualism of Cartesianism, or the mind/body distinction.⁵³ According to what is termed the “Cartesian problematic,” or “Cartesian dualism,” the view that the mind is a separate sort of substance than the body, knowledge is acquired exclusively through the mental capacity for reason and is a solitary activity undertaken in

⁵⁰ This concept, to be explained in this section, I find to be extremely useful in helping to bring out some of the assumptions in conventional western political theory which have contributed to ecosocial crisis, and I shall use this term in what follows in a sense close to the way in which Jaggar conceives of it but will apply it more generally to other aspects of ecofeminist theory.

⁵¹ See discussion in ch. 1.

⁵² For an astute discussion of the ways in which Lockean theories of property have influenced on American political and legal systems in such a way that environmental degradation is the logical outcome, see chapter 2 in Eugene C. Hargrove, *Foundations of Environmental Ethics* (Denton, TX : Environmental Ethics Press, 1989).

⁵³ Jaggar, *Feminist Politics and Human Nature*, p. 40-42.

isolation by individuals. Furthermore, under Cartesianism, the body and the mind are not simply thought to be fundamentally *different* from each other, but activities of the mind are held to be *superior* to and more worthy than activities of the body, thus providing the dualism with its normative dimension. According to liberalism and liberal feminism, what makes a human being intrinsically valuable are her or his mental capacities, particularly the capacity for abstract, rational thought, a property which according to this view can only be possessed by the ontologically isolated individual. Activities associated with the realm of the mental are therefore “better,” and performing them is what is thought to distinguish us from other animals in a way which putatively justifies their domination. Bodily activities, in contrast, since they are considered to be “base” and epistemologically useless, connect us with non-human nature in a way that is best repudiated, and do not contribute to our innate value and worth since we share these traits with the “lower” animals.

The prescription for political change endorsed by liberal feminism is to argue that since human essence and human worth is constituted by the ability to act as a free, rational, egoistic agent, and since human worth is the prerequisite for legal and political representation (as we saw in the discussion of the problem of applying rights-talk to animal welfare in chapter 1), women possess the same mental capacity for rationality as do men and therefore qualify for human status. “Early liberal feminists,” explains Jaggar, “saw their task as relatively straightforward. Since traditional liberal theory ascribed rights to persons on the basis of their capacity to reason, early feminists had to argue for women’s rights by showing that women were indeed capable of

reason. This has been a major thrust of liberal feminist arguments since at least the eighteenth century.”⁵⁴ This focus on articulating the ways that women are *like* men has meant that liberal feminists have tended not to substantively challenge prevailing notions regarding what constitutes a just social order, since the starting point of liberalism is that the good state is one which provides the legal tools which maximize freedom for its citizens; again, predicated on a notion of the autonomousness of human nature. Instead, liberal feminism has merely argued that women, too, on the basis of their uniquely human capacity for rational thought, ought to be included in the class of beings entitled to political rights. In effect, it would not be inaccurate to say that, insofar as the development of liberal feminist theory goes, women have argued that they should be considered honorary “men.”

Problems with Normative Dualism

The obvious difficulty with normative dualism and the liberal conception of human nature as radically isolated and autonomous is that this view causes those whose being is not as clearly separate and disconnected⁵⁵ from material nature to be seen as less “good.” Women, according to Jaggar, are especially damaged by this view because of their extensive participation in the activities of bearing and raising children, activities executed as much through the body as through the mind, and which imply an ontologically connected

⁵⁴ Ibid., p. 36.

⁵⁵ Feminist epistemologist and philosopher of science Nancy Hartsock states that, “There are a series of boundary challenges inherent in the female physiology—changes which make it impossible to maintain rigid separation from the object world.” Hartsock mentions pregnancy, menstruation, lactation, childbirth, and heterosexual intercourse as instances of boundary challenges (Nancy Hartsock, “The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism” in Kemp and Squire, *Feminisms*). Jaggar echoes this explanation for the different ontological perceptions of women and men throughout her book.

instead of ontologically separate human “essence.”⁵⁶ Because it is women who become pregnant, give birth, and breastfeed, and because it is women who are socially expected to take primary responsibility for the care of children even beyond the period of infancy, women are at a systematic disadvantage in being able to achieve full representation and participation in public life under the premises of liberalism.⁵⁷ These activities are disadvantageous in part because they clearly connect women with the realm of the “natural/ or “biological” a realm which is, as many have noted, systematically denigrated under the western philosophical tradition.⁵⁸ Women, according to liberalism and liberal feminism, are fully human and thus deserving of legal and political representation and protection insofar as they are able to participate in those activities of the “mind” thought relevant to politics: debate, public discourse, and the rational calculation of strategies necessary to maximize individual self-interest. Since normative dualism holds that what is especially valuable about human beings is their capacity for rational thought, persons are not considered to be exercising their “humanness” when they are

⁵⁶ At this point I expect it should be plain but I nevertheless will clarify my use of the word “essence.” I am not here suggesting that there is an actual ahistorical or presocial human nature, rather I am using this term to make plain the way that liberal political philosophy is wedded to a certain kind of essentialism in its ontology and metaphysics.

⁵⁷ For a compelling explication of the way that those who do “dependency work” (care-giving, either paid or unpaid) in society are considered to be less than full citizens under liberal democratic theory because they are less “autonomous” (a premise for full political participation), see Iris M. Young, “Mothers, Citizenship, and Independence: A Critique of Pure Family Values” in Iris M. Young, *Intersecting Voices* (Princeton: Princeton University Press, 1997).

⁵⁸ One of the primary tasks of philosophical ecofeminism is to make explicit the way in which things associated with the body or corporeal nature have been systematically denigrated in western culture and western philosophy, and to show how women have been associated with this realm in a way which has been detrimental to the interests of women. I will not go over the arguments extensively here, rather the idea that western culture is based upon the repudiation of the natural and the association of this with the feminine forms the premise of my argument. See generally Carolyn Merchant, *The Death of Nature* ; Susan Griffin, *Women and Nature* ; Val Plumwood, *Feminism and the Mastery of Nature*.

tending to the physical needs of others, as in, for example, the social practice of mothering.

This problematic, however, leads us to an important ecofeminist insight into the inadequacy of traditional political theory. Human beings are *not* fundamentally self-sufficient, as liberalism assumes; at every level of existence we rely on other-than-human nature to provide the resources to meet our material needs and we require the presence of other humans to help transform it into usable form. Thus our very being is conditioned by the biological necessity—a need possessed by *all* humans, men, children and women—of relationships with others. Young humans are particularly incapable of independently satisfying their physical and emotional needs and require long periods of intensive care, and these caregiving tasks could not, as Jaggar notes, be done by a single adult working in isolation. But it is not only children who require the care of others; adult humans too are dependent upon both human and ecological communities to survive and flourish. Thus, states Jaggar, “human interdependence is... necessitated by human biology, and the assumption of individual self-sufficiency is plausible only if one ignores human biology.”⁵⁹ She continues,

Normative dualism, however, encourages liberal theorists to ignore human biology, and we can now see how it generates a political solipsism that fundamentally shapes liberal theory. If liberals were to stop viewing human individuals as essentially rational agents and were to take theoretical account of the facts of human biology, especially, although not only, the facts of

⁵⁹ Jaggar, *Feminist Politics and Human Nature*, p. 41.

reproductive biology, the liberal problematic would be transformed. *Instead of community and cooperation being taken as phenomena whose existence and even possibility is puzzling...the existence of egoism, competitiveness and conflict, phenomena which liberalism takes as endemic to the human condition, would themselves become puzzling and problematic .*⁶⁰

Jaggar has here revealed that liberalist political and legal structures are theoretically incapable of taking into account the fundamental relationality of human and more-than-human existence, because they take as their starting point a belief in abstract individualism that denies that we are dependent upon each other and on the material world in order to realize our humanbeingness. This inadequacy is not only damaging to the interests of women, which is as far as Jaggar takes it, but harms the natural world also. Thus through such an understanding of the assumptions intrinsic to traditional legal theory, we begin to also see how an alternative perspective, and one which is explicitly ecological and takes sexist oppression seriously, will be necessary in order to not only thwart impending environmental catastrophe but to correct social injustice as well.

Feminist Political Theories and Conceptions of Human Nature

I. A different conception of human nature: Marxist feminism

⁶⁰ Ibid. I have italicized the final sentence here to draw attention to the way in which Jaggar's analysis, although not explicitly ecofeminist, arrives at many of the same conclusions that recent work in such fields as restoration ecology, wildlife biology, and environmental ethics have concerning the paucity of the Darwinian/Hobbesian models drawn upon by the natural and social sciences which assume conflict and competition as being the "natural state," and how such assumptions actually help create the kind of world they claim to be reporting on as an "objective" fact.

An early response to liberal feminism was Marxist feminism, which, following the political/economic theories of Karl Marx and Frederick Engels,⁶¹ opposes the conception of human nature as a fixed, static, presocial given. Instead, according to a Marxist feminist understanding of human society, human beings are “one biological species amongst many”⁶² who interact constantly and necessarily with the surrounding environment and with other members of culture. Marxist feminists thereby deny that it is possible to make a sharp distinction between human and other-than-human nature. The basic Marxist conception of human nature is that human beings are self-created out of *praxis* : conscious and purposeful work.⁶³ Praxis involves transforming the natural world in order to meet basic human needs, and is necessarily a social activity. Unlike liberalism, which does not consider human dependency on other-than-human nature to be relevant to political analysis, Marxism understands the natural world to be the material basis of life. Marxism also argues that there is a dialectical relationship between the kinds of activities that humans must undergo for survival and the formation of their consciousness.⁶⁴ The import of this is that Marxism and Marxist feminism recognizes that humans are embedded within nature and that there is a series of reciprocal relations that form the ontologies of both

⁶¹ The classic work is Marx and Engels' *The Communist Manifesto*, first published in 1848.

⁶² Jaggar, *Feminist Politics and Human Nature*, p. 53.

⁶³ *Ibid.*, ch. 4 *infra*.

⁶⁴ Even human physical traits are socially shaped, according to Marxism: writes Engels, “the hand is not only the organ of labour, it is also the product of that labour” (in Jaggar, p. 55). If Engels is correct (and I believe that on this point he is), then what this implies is that nature and humanity are constantly undergoing transformation and that the dialectical interaction between human and non-human nature will continue for as long as humans are a living species.

humans and the natural world.⁶⁵ Marxism then becomes a useful starting point⁶⁶ for constructing a political model from which to revision the nature/culture relationship.

With the birth and coming-of-age of the second wave of feminism, and especially with the entrance of radical feminism, however, Marxist feminism soon gave rise (but not necessarily gave way) to socialist feminism. Socialist feminism, “is the name sometimes used to refer to recent attempts to synthesize the insights of Marxist and radical feminisms to build a new theory combining the best of both.”⁶⁷ Before explaining more fully the way in which socialist feminism may have laid some important theoretical groundwork for the project of constructing a jurisprudence which reflects the insights of both feminism and environmentalism, it will be necessary to first conduct a review of its historical predecessor, radical feminism.

II. “Woman’s” “essence”: radical feminism

Radical feminism is that variety of feminist thought which understands women’s oppression as being biologically based, particularly through the practices of heterosexual intercourse and childbearing.⁶⁸ The most famous

⁶⁵ It is important to note that even while Marxism recognizes that human ontology is in many ways continuous and reciprocally emerging with that of nature’s, Marxists nonetheless conceive of human liberty as being only possible through the appropriation of nature’s “resources.” Marxism, then, envisions a political system in which the means of production are held in common (so that there be a classless society), and exploited equally by all. See the next note.

⁶⁶ Marxist feminism is a useful starting point, but not a good finishing point for an ecofeminist political theory, since, according to Karen Warren, “Marxists and Marxist feminists place liberated men and women, as one class, over and against nature” (Karen Warren, “Feminism and Ecology: Making Connections” quoted in Tong, *Feminist Thought*, p. 267). This also helps to explain why certain highly industrialized countries founded on Marxist political ideology such as the U.S.S.R. may have attempted to end class-based oppression, but nevertheless continued to degrade and despoil the environment.

⁶⁷ Valerie Bryson, *Feminist Political Theory* (New York: Paragon House Publishers, 1992), p. 234.

⁶⁸ Tong, *Feminist Thought*, ch. 3.

contribution of radical feminism to contemporary feminist discourse is the realization that “the personal is political,” which is to say that every aspect of life—the so-called “private” and the so-called “public”—is structured by gender inequality, and therefore attempts to alter interpersonal relationships within the home and the family are inherently political in that they ultimately alter the structure of society itself.⁶⁹ Radical feminists agree that the social meaning of women’s biological roles has been integral in shaping women’s oppression, but they disagree as to whether to valorize or repudiate the notion that women are more “overtly” “natural.”⁷⁰ The radical feminist conception of human ontology, however, has always seemed to tend to a sort of ahistorical essentialism,⁷¹ in which human nature is taken to be a biological given and that furthermore men’s and women’s natures are fundamentally different. Carolyn Merchant explains further.

For radical feminists, human nature is grounded in human biology. Humans are biologically sexed and socially gendered. Sex/gender relations give men and women different power bases. Hence the personal is political. Radical feminists object to the dominant society’s perception that women are limited by being closer to nature because of their ability to bear children. The dominant view is that menstruation, pregnancy, nursing, and nurturing of infants and young children should tie women

⁶⁹ Catharine MacKinnon, “Toward Feminist Jurisprudence,” in Smith, *Feminist Jurisprudence*, pp. 610-611.

⁷⁰ This debate has had important implications for ecofeminism, as I show below.

⁷¹ Interestingly, although both radical and liberal feminisms ascribe to a belief in a human essence, these essences are nearly diametrically opposed. While liberal feminism conceives human nature to consist in the ability to be a sort of “disembodied” mind (the free-willed, rational actor), radical feminism conceives of human nature as being located exclusively in the body.

to the home, decreasing their mobility and inhibiting their ability to remain in the work force. Radical feminists argue that the perception that women are totally oriented toward biological reproduction degrades them by association with a nature that is itself devalued in Western culture. Women's biology and nature should instead be celebrated as sources of female power.⁷²

This belief regarding the “naturalness” of the feminine has influenced the development of ecofeminism in a number of ways; ways that have been extensively discussed in the literature and continue to be a source of ongoing debate.⁷³ For our purposes here, however, it is sufficient to note that whereas some radical or essentialist ecofeminists claim that women are indeed closer to nature and therefore ought to be the ones to determine the cultural practices and social policy that affect the human/non-human relationship,⁷⁴ other ecofeminists state that the woman/nature connection is an associative link only which nonetheless has a long history in western culture; a link that has contributed to the oppression of women but also, importantly, has permitted women to cultivate the traits seen as necessary to forge a healthy relationship with the natural world.

⁷² Carolyn Merchant, “Ecofeminism and Feminist Theory” in *Reweaving the World: The Emergence of Ecofeminism*, eds., Irene Diamond and Gloria Orenstein (San Francisco: Sierra Club Books, 1990), p. 102.

⁷³ For a recent discussion, and criticism, of essentialism in ecofeminist discourse, see Mary Zeiss Stange's, *Woman The Hunter* (Boston: Beacon Press 1997). For an essay which views the debate surrounding the label “essentialist” as an attempt to police and marginalize specific forms of ecofeminist discourse, see Julie Cook, “The Philosophical Colonization of Ecofeminism” (*Environmental Ethics*, Vol. 20, No. 3, (1999) 227-247).

⁷⁴ Names commonly associated with this position include Charlene Spretnak, Starhawk, and Susan Griffin.

Socialist feminism and Socialist Ecofeminism: Merchant, Jaggar, and the Theoretical Bases for an Ecofeminist Environmental Jurisprudence

The most plausible definition of ecofeminism is that it is the attempt to elucidate the ideological bases of *all* forms of oppression, especially, but not exclusively, the oppression of women and nature. Alison Jaggar's political philosophy can be given an ecofeminist reading, because throughout her work she pays considerable attention the way that women have been linked with the body and nature in a way that has been used to justify their subordination through the process of normative dualism. In delineating the four basic views of human nature assumed by each one of the four feminist theories (liberal, Marxist, radical, and socialist) discussed in *Feminist Politics and Human Nature* , Jaggar is able to show how three of the four either make unwarranted assumptions about human ontology (as do radical and liberal feminism) or fail to fully capture the relationship of social and historical patterns of production to women's subordination (Marxist feminism). The form of feminism which most accurately understands the source and perpetuation of women's oppression and thus can most adequately address it for Jaggar is socialist feminism, a position she shares with the explicitly ecofeminist theorist Carolyn Merchant. For the remainder of this chapter, I will to continue to draw on the political analysis offered by Alison Jaggar but begin here to journey beyond her scope and attempt to apply her insights regarding the theoretical efficacy of socialist feminism to the development of an ecofeminist environmental jurisprudence.

Socialist Feminism and Political Ontology

Socialist feminism, according to Jaggar, conceives of human nature not as “fixed” or biologically given, as liberal and radical feminism do, but rather as changing in relation to the shifting patterns of social arrangements which characterize a particular society in a particular age. For socialist feminists, women’s oppression is dialectically related⁷⁵ to capitalism, a political economy⁷⁶ founded on the premises of liberalism. Capitalism relies on domination and exploitation in order to accrue profits, which under this political system is, of course, the name of the game. Because capitalist production requires an ever-increasing amount of raw resources in order to make the products which it must market, and requires that workers be paid the lowest wage possible while at the same time enticing them to expend large portions of income on unnecessary goods and services, capitalism both depletes nature and exploits human beings. Socialist feminists argue that women’s oppression is inseparable from the other varieties of domination and exploitation which go on in a capitalist patriarchy such as our own. Thus the task of socialist feminist political philosophy is, according to Jaggar, to “develop a theoretical account of these different types of oppression and the relation between them with a view to ending them all.”⁷⁷

⁷⁵ In the sense that the contemporary context of women’s subordination tends to arise out of and perpetuate the exploitive social relations of capitalism. A detailed discussion of the way that this actually occurs is conducted in chapters 6 and 10 of Jaggar.

⁷⁶ Jaggar gives the following definition: “The ‘political economy’ [of a society] is the complex system of interrelationships between its specific forms of political power and of ‘economic’ organization. The prevailing ‘economic system or ‘mode of production’ is thought to determine ultimately what happens in the ‘noneconomic’ realm and thus constitutes the ‘material base’ or ‘economic foundation’ of society.” (*Feminist Politics and Human Nature*, p. 134.)

⁷⁷ *Ibid.*, p.134.

Capitalism and Liberalism

In order to fully appreciate the way in which liberalism has contributed to the conditions which lead to environmental damage, one must acknowledge that, “[h]istorically, the liberal tradition in political theory has always been associated with the capitalist economic system. Liberal political theory emerged with the rise of capitalism, it expressed the needs of the developing capitalist class and the liberal values of autonomy and self-fulfilment have often been linked with the right to private property.”⁷⁸ Becoming fully aware of this incontrovertible though infrequently noted connection between the rise of capitalist modes of production and the development of liberal political theory—⁷⁹a theory heavily weighted toward protecting the social and economic privileges of white, first-world males at the expense of women, persons of color, and the environment— also helps to make more clear what ought be the foundations of a political and legal theory more capable of taking the interests of non-human nature into account. These foundations occur in socialist feminism.

Drawing upon socialist ecofeminism as a model for political relations is particularly helpful to the development of an ecofeminist legal theory due to the fact that socialist feminism, unlike the other varieties of feminism examined in this chapter, is not committed to the view that any one type of oppression is foundational. For socialist feminists, all oppression, including the oppression of women, minorities, and the natural world, is interrelated; none is more “primary” than any other and thus attempts to end the

⁷⁸ Ibid., p. 34. Chapter 4 returns to this discussion.

⁷⁹ The connection between capitalism, sexism, and anthropogenic environmental degradation is also comprehensively demonstrated in Carolyn Merchant’s ecofeminist classic, *The Death of Nature: Women, Nature, and the Scientific Revolution* .

oppression of one group, in order to be successful, must address the way in which structures and institutions of domination are mutually reinforcing. Correlatively, any attempt to end oppression in one sphere will begin to unravel the threads of domination knotted throughout the cultural/natural fabric.

Socialist feminism retains Marxist feminism's view of human nature as self-created through praxis and the relationship of a given people's relationship to the means of production and to the physical environment; it thus rejects radical and liberal feminist views that women's oppression can be understood outside of a historical, economic, and ecological context. Socialist feminism does not embrace rational autonomy as the ideal as does liberal feminism, but conceives of human beings as fundamentally ontologically, existentially, and epistemologically connected to each other and to the non-human world. Socialist feminists believe that human beings possess an ontology of embeddedness, understanding that we are inextricably embedded in society, in economic relations, and in nature. Socialist feminism also rejects the radical feminist view that human nature is permanently grounded in a fixed biological essence, but agrees with radical feminists that the social meaning of biological reproduction and sexuality has been crucial in causing women's oppression.⁸⁰ Thus socialist feminism comes closer than any of the other varieties of feminism so far discussed in being able to comprehensively address the root causes of ecosocial crisis, because it excludes neither nature nor nurture in its analysis of oppression. And socialist *eco* feminism, of the kind endorsed by Merchant, conceives of nature as an agent, an active and

⁸⁰ Bryson, *Feminist Political Theory*, p. 209; Jaggar, *Feminist Politics and Human Nature*, p. 124.

dynamic participant in the dialectic of history and culture. Nature thus becomes a “player” within the political process, and its needs and interests can become politically accounted for.

“For socialist ecofeminism,” claims Merchant, “environmental problems are rooted in the rise of capitalist patriarchy and the ideology that the Earth and nature can be exploited for human progress through technology.”⁸¹ From radical feminism, socialist feminism and ecofeminism draw the insight that human biological functions, especially women’s biology, should not be seen as degrading or limiting but rather are useful and enriching functions of humanbeingness that cannot be separated from who we are. Socialist feminists thus concur that disputes between men and women over such “personal” issues as sexuality, housework, and childrearing are also appropriate sites for political struggle that possess “public” as well as “private” ramifications. Socialist feminism contrasts with radical feminism however, in that it sees both human nature and the ontology of the material world as historically and socially constructed; as the product of changing historical, economic, and ecological relationships between persons, nature and the mode of production. Thus, for socialist feminists, “Any meaningful analysis [of environmental problems or social inequality] must be grounded in an understanding of power not only in the personal but also in the political sphere.”⁸²

This attention to historical and material conditions and the dialectical interaction of human and non-human nature is what makes socialist

⁸¹ Merchant, “Ecofeminism and Feminist Theory” in Diamond and Orenstein, *Reweaving the World*, p. 103.

⁸² Ibid.

feminism a useful political theory to draw upon in constructing an ecofeminist environmental jurisprudence. Ecofeminism I have already defined as a field within feminism and environmental ethics which seeks to explore the conceptual connections between environmental degradation and sexist oppression. A jurisprudence is an analysis of the ideas, attitudes, and beliefs which underlie a particular body of law or the institution of law more generally. An ecofeminist environmental jurisprudence would be a theory of law that could be used to both understand the sociopolitical processes by which women and nature are constituted as oppressed and to help *change* them. An ecofeminist environmental jurisprudence would reflect the insights of both feminism and environmental ethics, finding the places where the domination of women and nature intersect in law.

Law and Socialist Feminism

Law is not separate from life; law forms and mediates relationships, and through various narrative and linguistic mechanisms such as justicability, standing, and precedent it defines who or what is eligible to articulate a claim, and thus who or what matters, as I discuss in chapter 4. Law that is predicated on the assumptions of liberalism, as is law in the United States, is particularly masculinist in that it is founded on a perspective that has been found by feminists to be a male rather than a simply human perspective: a perspective in which “rationality,” “objectivity,” and “autonomy” are privileged while specificity and interdependency are submerged. “Liberal legalism” as MacKinnon recognizes, “is thus a medium for making male dominance both invisible and legitimate by adopting the male point of view in law at the

same time as it enforces that view on society.”⁸³ But these liberalist notions do not only harm and exclude women, they degrade nature as well. As discussed above, the political theory of liberalism rose out of the same mechanistic, atomistic philosophies which gave rise to modern science.⁸⁴ These philosophies championed such notions as “reason” and “objectivity” because they gave humans control over the natural world. The only creatures possessing meaningful subjectivity under this view are human beings (who are paradigmatically male), who by virtue of possession of these traits are accorded moral and legal standing. A system of laws that claims universality and rationality to be its dearest ideals, then, is theoretically incapable of taking adequate account of the interests of non-humans because harm to nature as nature remains legally inarticulable.⁸⁵

Therefore, what is needed is a political theory which overcomes the ecological and sexist limitations of the atomistic ontology of liberalism but at the same time does not posit a human nature which is biologically fixed and therefore unchangeable. As well, such a theory must be able to take account of the dynamic relationship between human beings and the more-than-human-world, and express the meaning of such relations politically. Socialist feminism, which subscribes to a historical, materialist, and dialectical conception of human biology, is potentially the most adequate grounding for an ecofeminist environmental jurisprudence because it

sees human nature and the forms of human social organization

⁸³ Ibid.

⁸⁴ Carolyn Merchant, *The Death of Nature*.

⁸⁵ For instance, despite the influence of Christopher Stone's *Should Trees Have Standing: Toward Legal Rights for Natural Objects* in environmental philosophy circles, twenty-five years after its publication the American legal system still does not offer a meaningful way to address harm done to natural systems that does not directly affect human beings. See chapter 4.

as determined not by our biology alone, but rather by a complex interplay between our forms of social organization, including our type of technological development, between our biological constitution and the physical environment we inhabit.... For instance, the physical environment does not just set limits to human social organization: organized human activity also affects the environment by draining, damming, clearing, terracing, leveling, fertilizing or polluting. The humanly caused changes in the environment in turn affect human social life which in turn affects the environment in a new way, and so on.⁸⁶

Socialist feminism is also most helpful to the project of environmental ethics in that it contains an explicit critique of capitalism, a system which reduces nature to a sink of resources and constructs people as egoistic, self-interested consumers.⁸⁷ In order for environmental ethics to succeed in its project of establishing an ecologically and ethically appropriate relationship between human beings and the natural world, legal reforms must be

⁸⁶ Jaggar, *Feminist Politics and Human Nature*, p. 111.

⁸⁷ See Mark Sagoff, *The Economy of the Earth* (Cambridge: Cambridge University Press, 1988). Plumwood addresses this tendency of liberalist political philosophy as well. She remarks, "The denial of dependency on the social other presupposed in the market conception of rationality is present in the original liberal account of the individual and of society and the state. In the founding fiction of the contract, society is treated as an instrumental association driven by self-interest, whose purpose is each individual's security and the co-ordinating and making available of the infrastructure for the market, conceived as the means to the satisfaction of the myriad individual desires. The individual's 'contract' with these others testifies to their externality to his needs, to their mere usefulness, their inessentialness. For such a lone, self-sufficient wanderer in the woods, he who encounters the other only accidentally and occasionally, the well-being of others is merely a contingent, mutual arrangement of convenience, not an essential part of his well-being.... This convergence is not accidental, but reflects the denials and exclusions of the master as the representative of reason in the public sphere of liberal capitalism." (Plumwood, *Feminism and the Mastery of Nature*, p. 152).

instituted which directly confront the capitalist industries which perpetuate environmental degradation. This socialist feminism is prepared to do, for as well as recognizing the reciprocal interplay of nature and culture, it includes as a category of analysis the way in which the values and assumptions of capitalism and liberalism are reproduced through legal and political institutions.⁸⁸

Conclusion: Environmental Law and Feminist Politics

At this historical juncture in ecosocial reality there is urgent need of ways in which to politically and legally recognize the needs of non-human nature. As well, we must encourage the institutions through which we live our lives and structure our society to foster a healthy, sustainable interaction between human beings and the natural world. Conventional political doctrines are inadequate to the task because they are founded on ontological presuppositions that perpetuate the belief that human beings fundamentally operate outside of nature. Much past and present philosophical work which has challenged the basic tenets of liberal capitalist patriarchy—especially that of feminism—has helped political theory to envision a more socially just society; however, these doctrines too have frequently failed to see the importance and necessity of including nature as a “player” in the political game. Feminist jurisprudence claims that gender, marked by a disparity in power between men and women, is as much an ideological construct maintained by a masculinist legal system as a biological “reality.”

Ecofeminism is a philosophical position which explicitly recognizes the

⁸⁸ Merchant, “Feminist Theory and Ecofeminism” in Diamond and Orenstein, *Reweaving the World*, p. 103.

interconnections between class, race, and gender-based power inequalities and environmental degradation. Socialist ecofeminism claims that human nature and non-human nature are not fixed “‘essences” that remain unaffected by historical contingencies, but that we can, and do, actively influence the way in which the female/male, nature/culture interaction occurs. It establishes that the relationships among men, women, and nature are social constructions that undergo continual change, that can be influenced for better or for worse. Thus a legal framework, an ecofeminist environmental jurisprudence, must be constructed that is able to confront and correct these inequalities in non-exclusionary discourse; a discourse that permits the possibility of radical social transformation. This, as I have shown in this chapter, is what a socialist ecofeminist approach to political theory is able to do. But how are we to move this discussion from the level of theory and begin applying such notions more directly to the way that environmental law is actually formulated? In the next two chapters I discuss various cultural narratives which underlie and inform environmental policy and law: narratives that implicitly share socialist feminism’s ontology of self as embedded within historical and physical relations, and narratives that reproduce through law the thesis of ontological separatism. I do so in order to identify those stories about nature (which are picked up and amplified within law) that have the greatest potential to harm or liberate the natural world. To identify such stories I will use the notions of ontological embeddedness developed in chapter 1 with which to examine the ideals and values instantiated in law more generally. In final sections of my third chapter, I will ultimately argue that environmental law will not achieve its goals of promoting ecological sustainability, enforcing

environmental protection, and mediating a healthy relationship between human beings and the natural world without taking ecofeminist insights seriously.

CHAPTER 3

LEGAL NARRATIVES AND ENVIRONMENTAL LAW

A relation is a mode of connection. This connection may be between people or kin in the same family or community, between men and women, between people, other organisms, and inorganic entities, or between specific places and the rest of the earth. A relation is also a narrative; to relate is to narrate. A narrative connects people to a place, to its history, and to its multileveled meanings. It is a story that is recounted and told, in which connections are made, alliances and associations established.

—Carolyn Merchant, “Partnership Ethics and Cultural Discourse: Women and the Earth Summit”⁸⁹

Law and Narrativity

The law, among other things, is a narrative. As such, it can enhance or hinder the promotion of ecological and non-sexist ideas in society. The law is a collective conversation that we are having *with* ourselves, about ourselves, and is as powerfully normative as it is normatively powerful.⁹⁰ The law tells a story; really many stories, reflecting and reinforcing dominant perceptions of ecosocial life, perceptions founded on the oppressive ideologies of

⁸⁹ To appear in *Living with Nature: Environmental Discourse as Cultural Politics*, eds., Frank Fisher and Maarten Hajer, (New York: Oxford University Press, 1998).

⁹⁰ On the law as promoter and codifier of morality, see generally Ronald Dworkin, *Law's Empire*, (Cambridge: Harvard University Press, 1986).

anthropocentrism, resourcism, and patriarchy. Feminist legal theorist Patricia Smith likens law to a mirror, but a mirror with limited and distorted vision.

Patriarchy is an all-encompassing worldview, and as an institution of patriarchy, law reflects that worldview as well. But because of its distinctive features as law—its reliance on precedent, which perpetuates the status quo—law is not like an ordinary mirror that instantly reflects the reality before it. Rather, it is like a magic mirror that always reflects a vision that is slightly in the past; that is, it can reflect reality only if reality moves slowly. Transient changes are therefore not reflected. Big changes or fast changes are reflected only after a period of transition. Because law is a somewhat selective, delayed-action mirror, feminist jurisprudence is concerned with correcting the current lag.⁹¹

Most of the time the visions law reflects and the stories it tells, then, are the “official” story, narratives that conceal the established discourses of domination upon which law relies for its power, by repeating such refrains as, “we are free and equal.” “We possess autonomy, rationality, and natural rights.” These themes it purports to tell of all of humankind, but in actuality provide a linguistic base from which political elites maintain their cultural hegemony, as the law “uncritically assumes a traditional male standard of what is normal.”⁹² The law may also address groups more specifically. “You are powerless,” it may say to an old-growth grove, or to a species threatened with extinction. It may say, “*you* have no standing. The law cannot

⁹¹Smith, *Feminist Jurisprudence*, p. 12.

⁹² Ibid., p. 13.

acknowledge your claim.” The law may say to women, “we do not recognize the kind of harm you are asserting” as it did, until recently, in the case of marital and date rape, and other harms which happen almost exclusively to women,⁹³ “therefore it must not exist.” Really, the law seems to be saying in cases like this, that “you (you salmon, you forest, you woman), as a center of subjective experience, are invisible. Therefore *you* must not exist.” When it speaks like this, it promotes the interests of individuals and groups privileged through systems of capitalist patriarchy, and effaces the voice of those marginalized and oppressed.

Interestingly (and joyously!), the law can also serve a more subversively liberatory purpose, de-stabilizing the master narrative of legal liberalism which reifies the individual as an egoistic, rationally-self interested consumer, separated from human and earth others. It does so when it acknowledges the rights of disenfranchised groups, creating openings for voices to be heard that challenge other streams of the conversation. “The law recognizes the importance of this relationship,” it may declare, when it rules in favor of a birthmother’s right to raise the child she bore over the contractual entitlement of the man who in essence rented her womb to be inseminated by him. “You count,” it says to the salmon, when a court orders that a dam release sufficient water that the fish can travel and reproduce. “You are connected. *We* are connected,” it suggests at times like these. When the law talks about human beings, it attempts to tell us about our

⁹³ Patricia Smith remarks, “It is surprising to think that what a harm is could be open to interpretation, but it is. Sexual harrassment, for example, was not a cause of action until very recently. Although women employees were coerced into sexual relations, it was not recognized as an addressable harm. Indeed, there was no word for it. There was not way to speak of it. It was just the way of the world, like breathing or drowning” (Smith, *Feminist Jurisprudence*, p. 13).

relationships with other humans, and with our relationship to power in the form of the state. When the law addresses environmental problems, it also attempts to tell us of our relationship with other things, other processes, and about our scientific conception of nature, dialectically weaving a story in which we must then dwell. The law, in many ways, situates us upon this earth.

Environmental Law and Ecofeminist Narrative

Environmental law as a field is dynamic and alive and very much in the process of development. It is an area of social life in which we can see active evidence of the human struggle to understand our moral and ontological relationship with nature. Although environmental law is largely founded on the same instrumentalist assumptions about nature that characterize the scientific worldview, at this moment in historical reality a space is being held open, by postmodern science and environmental philosophy, for a reconceptualization of the relationship between humans and the natural world. Such a reconceiving, expressed through ecofeminism, views the self as neither completely separate from and (thus superior to) human and more-than-human others, nor as completely, amorphically subsumed, but rather, as has already been noted, *embedded in relationships* ; as existing socially and physically in webs of relationality. This ontological perception, this embodied knowing, can be reflected and manifested through law. “A jurisprudence,” says feminist legal theorist Catherine MacKinnon, “is a theory of the relation between life and law.... Law actively participates in [the] transformation of

perspective into being.”⁹⁴ Law is one powerful medium by which human societies translate values and beliefs into material reality; it can provide institutional approval and support for particular perceptions and activities, while withdrawing nourishment from undervalued others. In a society structured and determined largely through legal discourse, environmental law and policy should be viewed as a necessary and important means of addressing the state of ecosocial crisis being faced by the planet’s inhabitants.

Environmental law has been influenced by a variety of sources, especially standards of science as they emerge through the dialectical interplay of history, nature, and culture. It is a construct of language, which is not to say that it is not “real”; rather stating that law is a linguistic construct implies that language is that through which our claims to know reality can be stated and carried. Language, for human beings at least, thus becomes the interface between our own individual consciousnesses and the rest of the blooming, buzzing confusion.⁹⁵ It is this capacity to express multiplicity, along with its open-endedness and malleability, that I believe gives law its power and promise as a means of promoting the spread of ecological ideas throughout society.

But as I have noted, the law can tell stories which impair the project of creating environmental sustainability as well. This complexity and multifaceted functioning of law is reflected in the words of feminist legal theorist

⁹⁴ MacKinnon, *Toward a Feminist Theory of the State*, p. 237.

⁹⁵ For a discussion of humans as essentially linguistic, see Walter R. Fisher, “Narration as a Human Communication Paradigm: The Case of Public Moral Argument” (*Communication Monographs*, Vol. 51, March, 1984). For the role of language in environmental ethics, see ed., Max Oelschlaeger, *Postmodern Environmental Ethics* (Albany: State University of New York Press, 1995); also, David Abram, *Spell of the Sensuous: Perception and Language in a More-Than-Human-World* (New York: Pantheon, 1996).

Robin West, who says that while law is to be understood by its content and its precedents, it is also “an ever-present possibility, potentially bringing good or evil into our future.”⁹⁶ West, in her book, speaks of the narrativity of law, and claims that particular laws and stories can be interpreted by reference to more than one text; that there is more the one source to which we can refer in order to find the meaning or proper interpretation of a law.⁹⁷ However, under conventional theories of jurisprudence we rarely do so, instead preferring to see established interpretations as “fixed.” Similarly, in environmental matters, we often appeal to only one text—the atomistic, mechanistic, reductionistic picture of the world given to us by modern science. But another “text” to which we might refer would be the one presented by ecofeminism. This narrative, or way of relating, says that we are ontologically embedded; and it is a story of human connectedness to the natural world. *This* is the story which law must tell about the nature/culture dyad in order to “talk-story” into being an existence in which both humans and nature can flourish.

The “stories” about nature that human beings like to tell have been divided by environmental philosophers into two general categories: anthropocentric, or human-centered, and nonanthropocentric. These approaches are mirrored in law. Anthropocentric approaches typically view nature instrumentally, as a resource to be utilized by humans for human benefit, and is the sort of understanding that environmental law, policy, and regulation has typically incorporated and enforced. Nonanthropocentric or ecocentric approaches, in contrast, view nature as something possessing

⁹⁶ Robin West, *Narrative, Authority, and Law* (Ann Arbor: University of Michigan Press, 1993) p. 346.

⁹⁷ *Ibid infra*.

intrinsic worth, and thus an entitlement to have its interests “count” in our moral and legal doctrines. But before exploring the narrative efficacy of one particular promising new notion, that of a *partnership ethic*, developed by the ecofeminist environmental historian Carolyn Merchant, we must briefly review present conceptions/narratives of nature held and expressed through law.

Interlude: A Brief Discussion of Historical and Contemporary Approaches to Environmental Law

I. *Noxious use*

Modern environmental law as it first emerged focused on abating what are called “noxious uses” or “nuisances”—uses of private property that diminish the amenity values (clean water, good-smelling air, nice views, and so on) enjoyed by owners of adjacent properties.⁹⁸ Plainly anthropocentric at their core (and thus responsible for hindering the spread of ideas which recognize the intrinsic value of nature), these laws are not concerned with damage done by particular human uses to the environment *per se* ; rather, suits filed under nuisance law seek to enjoin the perpetrator from interfering with the *human* use and enjoyment neighboring lands.

II. *The public trust doctrine*

Later, in response to increasing interest on the part of the general public in using nature recreationally , environmental lawyers fought for and gained

⁹⁸ Zygmunt J.B. Plater, Robert H. Abrams, and William Goldfarb, *Environmental Law and Policy: Nature, Law, and Society* , (St. Paul: West Publishing Company,1992).

a new interpretation of the *public trust doctrine* , ⁹⁹ as a means of providing natural environments protection under the law. This new interpretation has provided justification for the claim that certain landscapes and waterways ought not be appropriated by the few, but should be understood as being held in “public trust” by the state in order that all citizens might partake of these “natural goods.” ¹⁰⁰ However, while such an interpretation is indeed a promising and insightful use of the doctrine, and a laudable attempt to find legal grounds for protection of ecologically sensitive areas, it nonetheless falls at its root into the trap anthropocentrism, by claiming that what it is that is being held in public trust is the right of the public to enjoy these areas, and not that the environment itself possesses a right to exist free of defilement. Although such a use of public trust doctrine is likely to afford short-term protection for natural entities, it subtly reinforces the notion that nature in and of itself lacks value independently of that posited by a human being. Thus this view too, while well intentioned, is not the best narrative to rely upon in order to properly understand the value of the natural world.

⁹⁹ Stated briefly, the public trust doctrine is a product of the common (judge-made) law which emerged originally through Roman law, and states that certain qualities of the natural features of a land or nation, such as the ability to utilize navigable waterways or receive other uses and benefits from natural phenomena, cannot be privately owned and controlled because they and their utility must be recognized as belonging to all citizens. According to the Supreme Court in *Illinois Central Railroad Co. v. Illinois* : “It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties (146 U.S. 387 (1892)). ”

¹⁰⁰ The most celebrated use of the doctrine in this way is the famous *Mono Lake (National Audubon Society v. Superior Court* (1983) case, in which the court was willing to expand the traditional economic interpretation of public trust doctrine to include within its scope a consideration of aesthetic and ecological values as being legitimate interests which the state has the authority and obligation to protect.

III. *Standing for nature*

This last approach toward natural systems has been attempted by those working in the field of environmental law, one which more closely approximates the non-anthropocentric attitude which environmental theorists claim ought to guide our legal and moral formulations. This approach was pioneered by University of Southern California law professor Christopher Stone in a now-famous essay, titled *Should Trees Have Standing? Toward Legal Rights for Natural Objects*.¹⁰¹ In this well-reasoned and influential piece, Stone argues for the extension of legal standing (the right to file a court case on one's own behalf) to entities in nature such as mountains, forests, and waterways, instead of denying that such beings can assert a claim of direct harm.¹⁰² Stone points out that although it may seem absurd and unintelligible to us right now to consider natural entities as a "member of one's moral community," each time there has been an expansion of our circle of ethical consideration—such as when it was first proposed that blacks and women are inherently equal with respect to the dominant group—the idea has been first met with incredulity, resistance, and only finally and with struggle was it accepted as a "universal" and "self-evident" truth. Similarly, Stone claims, as more and more groups argue the case for "rights" for nature we will begin to see that the differences between persons and trees are not morally (and hence not legally) relevant. We therefore

¹⁰¹ Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects* (Los Altos, CA: Kaufmann Publishers, 1974).

¹⁰² The only alternative currently available to those wishing to represent environmental interests is to disingenuously couch the claim of injury in such a way that it appears that two sets of *human* interests—e.g., backpackers v. Disneyland Development Corp.—are at stake.

ought extend a right of legal guardianship to natural objects, taking an approach patterned after the way in which we safeguard the interests of children, the mentally dysfunctional, the comatose, and others we consider incapable of making moral judgments.

Although a less anthropocentric approach than the other two, this proposal is not unproblematic either. While in some ways it seems appropriate to say that nature has interests that theoretically parallel the interests that humans have, in other ways nature is radically *dissimilar* to humans. Thus, simply mapping human rights onto nature may be an ill fit, for this legal method may fail to capture nature's uniqueness and capacity for active agency.¹⁰³

IV. *Land ethics and land-use policy*

The above and other related approaches toward land-use policy in the United States are also discussed by political philosophers Lynton Keith Caldwell and Kristin Shrader-Frechette in their book *Policy for Land: Law and Ethics*.¹⁰⁴ In chapter four of the book, Shrader-Frechette identifies four primary land ethics which can form the normative basis of environmental law and policy. The first she identifies as *land-reform ethics*, which are those prescriptions that seek to correct inequities in land-holding by redistributing land (and thus its products) from the wealthy to the poor, while the second model, *land-use ethics*, attempts to restrict certain uses that create pollution problems which must be borne by the public. With the third, *land-*

¹⁰³ See the discussion of animal welfare and rights-talk in ch. 1.

¹⁰⁴ Lynton Keith Caldwell and Kristin Shrader-Frechette, *Policy for Land: Law and Ethics* (Lanham, MD: Rowman & Littlefield, 1993).

community ethics, the law embraces a Leopoldian¹⁰⁵ conception of human beings not as conquerors but “plain members and citizens” of the land community; while *land-rights ethics* constitutes the above-discussed attempt to fashion legal devices such as standing that would enable nature to assert legal claims.¹⁰⁶

Though these first two land ethics focus on issues of social justice and equity, they raise these issues only as a moral response to injustice amongst humans, and thus again reinforce the narrative of anthropocentrism, the story that says that we humans are at the heart of moral relevancy. The remaining two, however, can be classified as non-anthropocentric, and therefore would more suitably meet the purpose of retelling key passages in the ongoing saga of nature and culture. It should be noted, however, that although she discusses land-community and land-rights ethics sympathetically, as political tools these are ultimately rejected by Shrader-Frechette as too radical for contemporary liberal political interests to embrace. Noting this makes explicit the point I have been making throughout: that political liberalism is too deeply wedded to ontological separatism to be genuinely transformative. Instead of supporting reformist, incrementalist models of legal decision-making, more radical political models are needed to correct environmental oppression.

Law as Founded on Ontological Separation

As I have discussed in this thesis, there are other, more general ways, ways

¹⁰⁵ Drawn, of course, from ideas set forth in conservationist Aldo Leopold's ecophilosophical classic, *A Sand County Almanac* (Oxford: Oxford University Press, 1949).

¹⁰⁶ Ibid., pp. 51-62

built into the very structure of the legal system itself, that the law can tell a story that inhibits the development of a healthy and whole relationship between culture and nature. Taking its fundamental ontological assumptions from the mechanistic “billiard-ball” picture of the universe given by Cartesian and Newtonian classical science,¹⁰⁷ law in the liberal state is predicated on the thesis of ontological separation—the notion that human beings exist as fundamentally discrete, isolated, rational agents. However, a variety of interrelated bodies of thought—including postmodern science, feminist jurisprudence, environmental ethics, and socialist ecofeminism—are challenging this idea, suggesting instead that we are not ontologically separated but are ontologically interconnected. An ecological narrative, driven by a postmodern science which repudiates the mechanism of previous metaphysical schemes, tells us that we are embedded within a cultural/natural matrix, in which we are differentiated, but not distinct, from other natural events and processes. And as I have already suggested, this is an ecofeminist perspective as well.

What, then, might environmental law look like if it drew upon this sort of a perspective in order to accomplish its task? This question can be answered by examining an emerging third position, or way of relating to nature, one not marked by the assumption of a radical discontinuity between humans and the other than human world that characterizes most environmental law. Merchant deems this a *partnership ethic*, and I believe it could be fairly readily incorporated into existing political and institutional

¹⁰⁷ Carolyn Merchant, “Partnership Ethics and Cultural Discourse,” p. 18, manuscript.

structures.¹⁰⁸ Although a preliminary exploration, this notion provides hopeful new directions for environmental policy. Other hopeful directions for environmental law are explored in the next chapter.

A Partnership Narrative

As explicated by Merchant, a partnership ethic attempts to avoid the problems associated with the extremes of anthropocentrism and ecocentrism.¹⁰⁹ While an anthropocentric approach, as we have seen, is harmful to nature because it asserts that political decision-making need only take into account certain (narrowly defined, largely economic) human interests which rely on the exploitation and depletion of nature, a strongly ecocentric approach may imply what one critic has called “environmental fascism”¹¹⁰—the position that human interests, perhaps even basic ones—must be subordinated to what is good for the whole of the ecosystem. A partnership ethic, however, is “a synthesis between the ecocentric approach and the social justice aspects of the [anthropocentric] approach. It is based on the idea that people and nature are equally important. Both people and fish [or prairies, rivers, spotted owls] have rights.”¹¹¹ Merchant continues,

Partnership as a word is experiencing a renaissance in the

¹⁰⁸ Which is not to say that it would not meet with institutional resistance. As Max Oelschlaeger, under whose direction this thesis was written, commented on an earlier draft, power is never ceded without a fight.

¹⁰⁹ Merchant, “Partnership Ethics and Cultural Discourse,” *infra*.

¹¹⁰ Peter Singer, quoted in Caldwell and Shrader-Frechette, *Policy for Land*, pp. 55-56. This term, from its outset, has carried a great deal of rhetorical power, and has generated large numbers of essays within the environmental ethics literature to be devoted to defending ecocentric positions against the charge that environmental ethics is fundamentally misanthropic. The position I am taking certainly does not hold this.

¹¹¹ Merchant, “Fish First! The Changing Ethics of Ecosystem Management” *Human Ecology Review* (Vol. 4, No. 1,(1997)).

discourse of the business and environmental communities. Successful environmental partnerships, focused on resolving policy conflicts surrounding local issues, are forming among corporations, local communities, government agencies, and environmental organizations. Trees, rivers, endangered species, tribal groups, minority coalitions, and citizen activists may all find representation, along with business at the negotiating table, *The partnership process offers a new approach to collaboration, one in which nonhuman nature itself can be a partner.* ¹¹²

Thus the advantage of a partnership ethic is that it includes nature as an active participant in politics whose needs must be considered, without falling into the problems presented by conventional rights-talk discussed in chapter 1. The narrative efficacy would lie in the ability of such language to recast the human/nature relationship from one of separation and exploitation to one of active and equal co-operation. A partnership ethic treats nature as a living subject, and as something containing inherent worth.¹¹³ But a partnership ethic also recognizes human needs and interests, and thereby would be an important ingredient in fashioning a comprehensive ecofeminist environmental jurisprudence. “[Environmental] law,” note Caldwell and Schrader-Frechette, “like all other legislation, is culturally derived and is reflective of politically dominant social attitudes and conventions. When social attitudes change to form an altered critical mass of activated public opinion, the law will follow even though belatedly. Once adopted, law often

¹¹² Merchant, “Partnership Ethics and Cultural Discourse,” p. 2, manuscript (emphasis added).

¹¹³ Ibid., p. 7

affects attitudes—more often behaviors.”¹¹⁴ Again, it is this dialectic between conceptual frameworks, attitudes, and personal and social action that cast law as such a powerful medium for rectifying (or encouraging) environmental degradation. We must, for the health of ourselves and the planet, find alternate narratives.

Conclusion

The law, then, dialectically reflects and creates dominant perceptions of the world. The law “actively transforms perspective into being.” Our being is our ontology; thus law serves not just as abstraction or convention, it actually shapes the way we are able to be in the world. The law, as a creator and mediator of relationships, influences these relationships to be healthy or damaged. The world is in need of narratives which can re-tell the story of human situatedness within the natural world, one in which human embeddedness within nature is acknowledged. And while some narratives tell a tale of human superiority and reinforce destruction and exploitation, others are transformative, envisioning a cooperative and mutually-beneficial interchange between humans and nature. In my next and final substantive chapter, then, I will investigate more directly the ways that the law can accomplish this constructive task and tell that story which is best for *all* involved.

¹¹⁴ Caldwell and Shrader-Frechette, *Policy for Land*, p. 135.

CHAPTER 4

CONSTRUCTIVE STRANDS WITHIN A POSTMODERN LEGAL NARRATIVE; OR, HOW TO BUILD AN ECOFEMINIST ENVIRONMENTAL JURISPRUDENCE

Feminist analysis is appropriate to any area, concepts, relations, and institutions of law, and many legal theorists offer feminist critiques of standard legal categories.... Clearly, the issues covered by feminist jurisprudence are as wide ranging as the areas covered by law.

—**Patricia Smith, *Feminist Jurisprudence*** ¹¹⁵

Law and Ecological Narrative

Law, as I have argued, can be thought of as a narrative, a story told by human culture-dwellers which reproduces the dominant perceptions of modernity, keeping particular ideologies alive even at a time when society is undergoing shifts in the way in which it constructs the subjects and the objects of the world. Indeed, the law's propensity for conservatism, its foundational role in maintaining the status quo and perpetuating established power-structures and the interests of ruling elites is legend, as is evinced by

¹¹⁵ Patricia Smith, *Feminist Jurisprudence*, p. 4.

the inescapability of the jurisprudential doctrine of *stare decisis* — the obligation to act in a manner consistent with past rulings—by which every judge is thought to be bound. MacKinnon explains that,

Substantive doctrines like standing, justiciability, and state action adopt the [viewpoint of patriarchy]. Those with power in civil society, not women [or natural entities], design its norms and institutions, which become the status quo. Those with power, not usually women [and never other-than-human beings], write constitutions, which become law's highest standards. Those with power in political systems that women did not design and from which women [and those linked with women] have been excluded write legislation, which sets ruling values. Then, jurisprudentially, judicial review is said to go beyond its proper scope...[when it] scrutinize[s] the underlying substance.¹¹⁶

But in an apparent paradox,¹¹⁷ law carries transformative possibility as well, and can serve as a critical tool for radically changing the way in which humans inhabit their world. As Patricia Smith states in the introduction to her edited volume,

Feminists have made practical suggestions for enhancing the

¹¹⁶ MacKinnon, *Toward a Feminist Theory of the State*, p. 238.

¹¹⁷ Think, for example, of the way in which *Brown v. Board of Education* is typically (and rightfully) understood as a way in which society is morally improved through the power of law, and as a time when the law saw things through the perspective of the disenfranchised. MacKinnon notes that it is precisely at such moments that law is revealed as perspectival and partial, instead of universal and neutral. "The point of view of a total system emerges as particular only when confronted, in a way it cannot ignore, by a demand from another point of view. This is why epistemology must be controlled for ontological dominance to succeed.... When seemingly ontological conditions are challenged from the collective standpoint of a dissident reality, they become visible as epistemological. Dominance suddenly appears no longer inevitable. When it loses its ground it loses its grip" (Ibid., pp. 239-240).

possibility [of legal justice for all] by recognizing the nonneutrality of law and *enlisting views that often go unheard....* [I]t is not reasonable or just to adhere to old legal methods that limit what counts as a cause of action, what and who can be considered, who can be heard, what can be thought, and what counts as a legal judgment. *New methods of legal reasoning must be advanced* that can open up the process to provide truly equal access and genuinely equal consideration for all.¹¹⁸

When the law talks about human beings, it attempts to tell us about our relationships with other humans, and our relationship to institutionalized power that we know in the form of the state. When the law addresses environmental issues, it also attempts to tell us of our relationship with others things, other processes, and thus implicitly the law reveals our scientific and normative conceptions of nature. Thus, as I have been arguing, the law situates us within the nature/culture dialectic by weaving a narrative through which we live out our lives.

Since the law operates dialectically, that is, it tends to pick up and amplify debates occurring within the many cultural narratives, thus influencing and being influenced by the myriad cultural codes extant at a particular historical juncture, it both creates alternative and reflects dominant perceptions of the world. The law, in the words of MacKinnon, then “translates these perceptions into being” by legitimating some relationships, reifying them institutionally, while negating others, reducing their public status as well as

¹¹⁸ Smith, *Feminist Jurisprudence*, pp. 13-14 (emphasis added).

their efficacy. As I have argued, the law influences the relationship between humans and nature by refining and codifying particular strands of the nature/culture narrative. Within environmental law as it stands there are competing strands, and indeed judges and courts in particular are able to draw upon disparate stories about the human relationship with nature.¹¹⁹ Some narratives tell a tale of human superiority and reinforce attitudes of destructiveness and exploitation, others are transformative, envisioning a cooperative interchange between humans and the rest of the natural world. The project of environmental ethics is to construct ecologically and ethically appropriate ways for human beings to live their lives in consort with nature, and the project of ecofeminism is to confront the discourses of dominance which link sexist oppression and environmental degradation. In accord with these projects, I will for the duration of this chapter attempt to uncover specific narratives within the tapestry of Anglo law which are re-telling the story of human situatedness within the natural world, narratives in which our embeddedness within nature is acknowledged. By examining particular

¹¹⁹ Although it will not be discussed here, there are at least three theories of jurisprudence which explain what law is and what it ought to do: that is, how judges ought to interpret and apply the law. The first of these is *legal positivism*, often associated with H.L.A. Hart, which claims that the law is what ever system of rules jurists say it is; contrasted with a theory of law best articulated by Ronald Dworkin, who claims that the law is permeated with and thus refers to moral values held by the community at large. A third and more radical conception of jurisprudence, Critical Legal Studies (CLS), rejects the conventional distinction between adjudication and politics, asserting that because society itself is not undivided concerning its values and beliefs and there are at any given time in any given case competing strands of thought concerning the proper course of action, there is a fundamental indeterminacy within the law which cannot be resolved by appealing to an outside set of fixed principles. Instead, "the spectrum of ideological controversy in politics is reproduced in the law" (Andrew Altman, "Legal Realism, Critical Legal Studies, and Dworkin," *Philosophy and Public Affairs* Vol. 15, No. 3, (1986) pp. 205-236). What this means in practical terms is that so long as a particular point of view is represented somewhere in the patchwork of cultural thought, a judge is "free" to read her or his favored theory into the law. In this sense, the law emerges as open and fluid, and judges and courts thus very much participate in larger political debates which arise from and influence culture.

laws, court cases, and elements of contemporary legal theory, I will finish the substance of this thesis by bringing the insights which can be gleaned from ecofeminism to bear on the question of what exactly a postmodern approach to law might be, and how the law indeed might tell that story which is best for *all* involved.

Wetlands, Regulatory Takings, and the Conceptual Foundations of Property Law

One way in which humanity expresses its conception of the relationship between itself and the rest of nature is through property law. In a 1995 *UCLA Law Review* article, Eric Freyfogle discusses the tension between conventional notions of the sacrosanct nature of private property and rising public awareness of the importance of environmental health, specifically through the problem of wetlands protection.¹²⁰ Wetlands are ecologically sensitive areas that perform filtering functions and host species not found on either dry land or in waterways. Like other areas of special ecological importance—barrier islands, endangered species habitats, riparian corridors, biome crossings, and the like—when wetlands are severely altered the environmental repercussions tend not to remain localized but rather ripple widely throughout an ecosystem, often affecting other organisms and land forms in unpredictable and deleterious ways.¹²¹ Until the Federal Water Pollution Control Act was first enacted in 1972, the law, reflecting the dominant perceptions of the time, failed to recognize the ecological

¹²⁰ Eric T. Freyfogle, "The Owning and Taking of Sensitive Lands" *UCLA Law Review* (Vol. 43, No. 1, (1995)), pp. 77-138.

¹²¹ *Ibid*, p. 78.

importance of these areas, and landowners eagerly proceeded to drain and fill them for more economically-beneficial uses “as if on a moral crusade.”¹²² Over time, however, a patchy body of law has emerged in the United States in response to a growing awareness that human beings cannot ceaselessly alter the “natural character”¹²³ of the land with impunity. The evolution and current state of this law may provide some important insights into postmodern trends within environmental law.

In most wetlands cases,¹²⁴ the legal issue, and the one considered justiciable,¹²⁵ is whether or not a governmental agency can implement regulations constraining the ability of private landowners to drain and then develop property situated upon wetlands without having to pay “just compensation” as required under the Takings Clause of the Fifth Amendment of the U.S. Constitution.¹²⁶ A “takings” is generally defined as the seizure of private lands for public benefit such that the owner is deprived of control and present and future economic return. While originally designed to prevent uncompensated physical appropriation, a taking can also occur when regulations are passed which diminish the economic viability of the

¹²² Ibid, p. 79.

¹²³ This is one of the key terms used in the New Zealand Resource Management Act, which will be discussed in the next section.

¹²⁴ Specific cases informing the discussion here include *Lucas v. South Carolina Coastal Council* (112 S. Ct. 2886 (1992)), *Loveladies Harbor, Inc. v. United States* (28 F.3d 1171 Fed. Cir. (1994)), and *Rowe v. Town of North Hampton* (553 A.2d 1331 (N.H. 1989))

¹²⁵ Able to be decided upon in a reasoned way by a court of law.

¹²⁶ The relevant clause reads, “No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.” (Constitution, amend. V, Sec. 1).

parcel.¹²⁷ In wetlands cases, plaintiffs typically argue that in the enactment of environmental regulations designed to protect the ecosystem, exactly such a thing has occurred: the plaintiff (land-owner) has been deprived of the economic benefit which was expected, and thus she or he should be paid an amount equivalent to what could be received if the land were put to its “economically best” use.¹²⁸ The chilling effect rulings favorable to the landowners might have on the development of an ecocentric environmental law is now apparent: if such regulations are frequently ruled a “taking,” then federal and local governmental agencies risk having to pay large sums to private parties each time environmental protection is sought. And unfortunately, rulings have been favorable to the plaintiffs in many cases.¹²⁹ However, Freyfogle’s analysis presents a compelling examination of the way in which the growing popular recognition of the moral and ecological

¹²⁷ The case which established this principle is *Pennsylvania Coal Co. v. Mahon* (1922) in which the Supreme Court, in asking whether or not a state regulation which denied a private coal mining company the right to extract coal from lands which lay underneath public structures when such an action might jeopardize the integrity of such structures constituted a taking, ruled that “Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law...[But] the general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” (260 U.S. 393, 43 S.Ct. 158)

¹²⁸ Freyfogle, pp. 77-94 *infra*.

¹²⁹ A precedent-setting example is *Lucas v. South Carolina Coastal Council* (112 S.Ct. 2886), decided in 1992, in which the high court, led by Justice Scalia, determined that if a property owner’s “reasonable expectations” regarding economic use of the land were thwarted by the enactment of governmental regulations, then regardless of the extent of public benefit, the takings must be compensated. Although this indeed set a poor precedent for environmental interests, this case also demonstrates cause for hope for change in legal reasoning, as Justice Stevens argued in the dissent that “The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined “property.” On a lesser scale, our ongoing self-education produces similar changes in the rights of property owners. New appreciation of the significance of endangered species; the importance of wetlands, and the vulnerability of coastal lands, shapes our evolving understanding of property rights” (J. Stevens, dissenting opinion, *Lucas v. South Carolina Coastal Council*).

importance of the land community is challenging traditional, long-held notions about the relationship of human beings to nature, and how such shifts may be ushering in “a fundamentally new way, an ecological way, of thinking about owning the land.”¹³⁰

Freyfogle notes that the legal tension between property owners and regulatory agencies arises because of the conflict between traditional Lockean conceptions of land-as-property, an ownable object to be utilized for human benefit, and what I am defining as postmodern and ecofeminist conceptions of the land as a living, changing, system in which humans are ontologically embedded. In describing the conceptual and historical development of property law, Freyfogle states,

The pronounced tendency to view land as commodity coincided with and helped foster the abstraction of landed property in legal thinking, a...path leading to present day conflict. In nature's economy, each acre had distinct features; each parcel formed part of a diverse, living community. In the law, on the other hand, property became a disembodied idea... Property was not the thing itself but the owner's powers over the thing, a bundle of rights as against all other people to control, use, consume, and transfer without interference by outsiders.¹³¹

Thus, Freyfogle's argument suggests how the combined project of a postmodern environmental philosophy and feminist jurisprudence might be quite useful in deconstructing some of the ways ecosocial crisis is perpetuated through social institutions. Although postmodernists typically defy

¹³⁰ Freyfogle, p. 79.

¹³¹ Ibid., p. 97.

methodological categorization, they generally reject the notion that there are abstract, universal truths which exist outside of history and cultural linguistic constructions, and note that a plethora of power-claims lie concealed within supposedly neutral discourses.¹³² The attempt to see land not as an ecologically contextualized thing but rather as *tabula rasa* through which abstract notions of property, individualism, and rights can be expressed shows itself as party to exactly such a project, and is thus revealed as perpetuation of a modernist “master narrative,” privileging the elites whose interests it serves itself by effacing alternate perspectives. Freyfogle continues,

As lawyers and economists considered the matter more and more, property lost its tethers with any particular spot on the landscape; it became an imaginary ideal, unrelated to the natural world. In the world of theory, an owner’s legal rights transcended the details of place to take on an independent existence. The rights of ownership meant the same without regard for place or person; each parcel was discrete, and the sticks in the bundle could be described and inventoried without concern for soils, vegetation, or elevation. Economists liked this new idea because it helped package the land as a marketable commodity. Lawyers liked it as well, for the more theoretical and abstract the law became, the more the law seemed like a distinct, legitimate discipline, as rigorous and logical as any natural science. Detached from real people and real places, law could operate with all the predictability of Newtonian physics.¹³³

¹³² Max Oelschlaeger, *Postmodern Environmental Ethics*, p. 7.

¹³³ Freyfogle p. 97.

The claims made by MacKinnon, West, Warren, Plumwood, and other feminist theorists now become quite useful for illustrating the way that the philosophical presuppositions going into legal formulations determine the character of the outcome. Law is not separate from life. Law forms and mediates relationships according to the sorts of assumptions on which it is founded. Law, predicated on assumptions like those underlying the culturally dominant notion of private property is founded on a perspective that has been located by feminists to be a male rather than a simply human perspective: a perspective in which “logical,” “objective,” and “abstract” are privileged modes of discourse¹³⁴ while the sort of specificity and interdependency that is characteristic of human and ecosystemic relationships is repudiated.¹³⁵ Law itself is a reflection of the same conceptual frameworks which gave rise to classical science and political liberalism. Both are founded upon a philosophy of ontological separatism. This philosophy holds that the natural and cultural worlds consist of radically isolated, atomistic particles that are only peripherally in contact with others. According to Freyfogle’s account, the evolution of property law followed closely the development and application of modernist conceptions of truth, legitimacy, and physical being. When the law could treat land as though it were something separate from human beings, from which humans can create economic value but is not valuable in itself, it was also possible to detach that value and transform it into an abstract concept, stripped of the annoying particularities that might render it less manageable, and certainly less transferable.

¹³⁴ See ch. 1.

¹³⁵ This, of course, is precisely why socialist feminism provides a more ecologically adequate political framework from which to fashion an ecofeminist environmental jurisprudence.

Interlude: Feminist Primatology and Environmental Law: Changing the Field of Possibilities

Masculinist, modernist modes of thought are not limited to law, and are being currently challenged in a number of disciplines by theorists and practitioners who are unraveling the deep interconnections between what have hitherto thought of as discrete disciplines. In *Primate Visions: Gender Race and Nature in the World of Modern Science*¹³⁶ postmodern feminist Donna Haraway provides a startling analysis of anthropology and primatology as fields which are charged with particular conceptions of the nature/culture interaction, conceptions which are strongly implicated in the modernist project of ecosocial domination—where land, animals, and women are instrumentalized and stripped of subjectivity. *Primate Visions* presents primatology as a field where the definitions of male and female, intelligent and dumb, nature and culture, human and animal are actively being negotiated. Haraway's argument that primatology is a western, masculinist, and sexualized discourse that has been pivotal in creating and reproducing the narratives of power-entitlement and human superiority leading to the domination and thus destruction can be of use also to the development of ecofeminist legal theory, for

The hope is that in the de/reconstructions of woman and female going on internationally in science and politics, there is emerging a field for envisioning fruitfully contradictory and multiple possibilities for new links

¹³⁶ Donna Haraway, *Primate Visions: Gender, Race, and Nature in the World of Modern Science* (New York: Routledge, 1989).

between knowledge and power, for new apparatuses of
bodily production for craftily reinventing what it means
to be—always situated, always specified—human.¹³⁷

To resist this definition of humanbeingness that Haraway offers—humans as radically situated in particular historical, social, and natural contexts—would be a predictable and consistent move on the part of those whose ideologies are shaped by the dominant constructions of reality. In the case of property owners, resisting a definition of the human subject as enmeshed with and thus obligated to non-human others ensures that the only inhibitions to the full development of their land are market ones. But here we arrive at one of the central dilemmas of postmodernism. To simply presume that denials of notions such as Haraway's are a reactionary response forwarded by of those benefited by belonging to the privileged race/sex/class/species would be easy, perhaps too easy. Is something deeper is going on here? What is really at stake by agreeing to a definition of science (or law) that is "charged with the bio-politics of being primate"?¹³⁸ What might be lost, and what might be gained, through such an understanding, and how does this understanding affect the project of constructing a postmodern and ecofeminist environmental jurisprudence?

What is lost through a postmodern inquiry is the possibility of ground. Neutralized and destabilized is the fixed definition of what counts as reality offered by modernity, and along with it the promise of a sure understanding of the workings of politics and human nature. So too is lost moral authority. To understand primatology, law, ecology, philosophy, etc. as discourses that

¹³⁷ Haraway, *Primate Visions*, p. 286-287.

¹³⁸ *Ibid.*, p. 286.

are not superficially but *deeply* interpenetrated with, actually consisting of, invented meanings, textual language-games, and power-interests is to in some senses admit to a radical subjectivity, and thus a world in which no agent can claim a higher authority for his/her actions and beliefs. Such an admission is not only disturbing to those invested in the hegemonic, business-as-usual world of corporate-capitalism, it is equally unsettling for those wishing to embark on the different and difficult project of political restructuring and environmental repair, for it leaves those agents too without a transcendent claim to moral superiority and action in the name of what is “right.”¹³⁹ Even less so are they left with a sure, scientifically-ordained prescription to fix things. Instead, an appreciation for and utilization of a feminist postmodern methodology at best yields an “ability to destabilize the narrative fields that gave rise to both primatology and feminism, thereby generating the possibility of new stories not strangled by the same logics of appropriation and domination, *but also not innocent of the workings of power and desire including new exclusions.*”¹⁴⁰

But in the game of determination of which set of values shall rule human praxis and institutions, do we then merely rid ourselves (deconstruct) the old narrative of white male superiority and replace it with the new and improved “feminist” ideology, in the belief that the traditional values of femininity will clean up the mess the boys have made in the living room?

No. Although it has been by now thoroughly established in the literature that such a reversal is a naive understanding of the feminist project and

¹³⁹ In fact, this is one of the reasons why Critical Legal Studies meets such opposition in legal philosophy, for it asserts that there is no one “right” way to understand the law; rather there are a multiplicity of “correct” interpretations.

¹⁴⁰ Haraway, *Primate Visions*, p. 288 (emphasis added).

counter to its goals, it is still difficult for those inhabiting a world shaped by masculinist discourse to become free of such oppositional, binary thinking. Thus assertions that the objective of feminism is not to replace male dominance with female dominance (because of course that would just reproduce the same problem) bear repeating. “The intersection [of feminism and primate studies] works not by replacing feminist stories for masculinist ones, or scientific stories for ideological ones, truths for representations, but by *restructuring the whole field of possibilities* .”¹⁴¹ To restructure the field of possibilities for Haraway requires as a precondition the deconstruction of origin-stories about human beings and the revelation of how the unavoidable biases due to social positioning of researchers have deeply but not unalterably influenced the way we view our simian relatives and thus our own relationship to what we call “nature.” But it cannot stop there. Humans, and particularly those involved in the project of environmental ethics, must deconstruct old stories while simultaneously inventing new ones about our relationship with the natural world. *To deconstruct and invent within legal discourse is the purpose of an ecofeminist environmental jurisprudence.* And one story is not as good as another.

So here, then, is what is gained through postmodern feminist approaches to the discourses of nature and culture. Even if we lose the sureness a master narrative ostensibly provides concerning our ontological position toward and epistemological access to nature, we acquire the ability to tell a story that simultaneously deconstructs the notion of humans as “outside” of nature and narratively repositions humans as embedded in matrices of ecological

¹⁴¹Ibid, p. 303 (emphasis added) .

and social relations. In this story, humanity does not conquer and by so doing ultimately forfeit its presence in this remarkable biological web, but negotiates, converses with the earth as an agent and a subject in order to leave open the ability to continue to intercourse with natural beings in an evolutionary setting. “When biology is practiced as a radically situational discourse and animals are experienced/constructed as active, non-unitary subjects in complex relation to each other and to writers and observers, the gaps between discourses on nature and culture seem very narrow indeed.”¹⁴²

Destabilizing established, authoritative fields of discourse such as science and law and recrafting the story of metaphysical separation to one of ontological embeddedness requires a tremendous amount of courage and imagination. If one accepts that sex and the social meaning of gender is implicated in the modernist practice of environmental mastery and control, then one must also accept that those occupying the “marked” sex must play an active and in many ways uncomfortable role in moving the analysis of race/class/gender from the periphery to the center of the conversation. One must keep bringing it up, again and again. This is not to say that it is a requirement that one be female or that this is *all* which is required in order to challenge the hierarchical structuring of western society. As Haraway notes, destabilizing a story-field requires that many things be done, and there are many roles to play. As well, to even be aware that change is needed and to envision/invent that change means that “one must be formed at a social moment when change is possible.”¹⁴³

That social moment is now . Narrating other stories requires collective

¹⁴²Ibid., p. 375.

¹⁴³Ibid, p. 303.

action. It is not solely an intellectual undertaking appearing and affecting only the world of the scholarly written page but is a material practice, affecting actual lives. Stories, narratives, discourses set the conditions of life by informing us of what it means to be who we are, dialectically influencing political institutions and practices. Since law in the west is predicated upon a particular notion of what it means to be a human being, and that notion is the liberalist notion of radical individualism and ontological separation, to challenge human origin-stories that claim that fundamental motor of evolution is competition and aggression, and that human survival was/is made possible by male-dominated hierarchical social structuring (as the anthropologists in Haraway's book have done) is to also tug on and loosen these narrative threads in that part of the social fabric that delineates law. Law, like science, is a narrative that tells stories, typically stories embedded in Hobbesian conceptions of innate intra-human competition and Lockean notions of earth-ownership as an inalienable right. These narratives are not unlike (and in fact are the inspiration for) the paleo-scientific stories told by first- and second-generation primatology asserting that the essence of humanbeingness is to be a singular male technology-wielder and appropriator of female bodies. Environmental law, at least in its radical potentiality, challenges the notion that human beings are/ought to be the rightful/lawful owners and possessors of nature. Feminist law seeks to demonstrate that the liberal-industrial state operates through the appropriation of female (and that of males with "minority" status) labor and reproductive ability, exploiting both in the maintenance of capitalism. Through using a socialist feminist methodology, a feminist environmental

jurisprudence contests these received meanings of the boundary between nature and culture, male/female, self and other as they are expressed in legal and scientific discourse, and also makes explicit the intense but usually concealed normativity attached to these concepts. An ecofeminist environmental jurisprudence will also empower the movement to end oppression, will help to re-craft, re-invent a story of the human/nature interrelation that locates being in the field of ecosocial dynamism in which contextuality and specificity consequentially figure.

Possible Models for an Ecofeminist Environmental Jurisprudence: The New Zealand Resource Management Act

To this juncture I've argued that at this historical moment there is urgent need of ways in which to politically and legally recognize the needs of the rest of nature. As well, we must encourage the institutions through which we live our lives and structure our society to foster a healthy, sustainable interaction between human beings and the natural world. Conventional legal approaches toward nature, such as those exemplified in much of past and present-day property law, have shown themselves to be inadequate for a cluster of interrelated reasons: land is seen as an abstract, economic-value producing entity to be used strictly for anthropocentric purposes, human activities are thought to operate outside of nature, and parcels of land are utilized without regard to their particular location and function within a specific ecosystem. However, certain attempts are being made within the western world to correct such approaches toward environmental policy and

to create discourses that encourage more healthy, sustainable, and inclusive nature/culture relationship in ways that are consistent with an ecofeminist environmental jurisprudence. I will conclude the body of this thesis by examining one such example, the New Zealand Resource Management Act of 1991, in this light.¹⁴⁴

The New Zealand Resource Management Act of 1991 (hereafter referred to as the RMA), according to Alastair Gunn and Carolyn McCallig, “is a comprehensive and philosophically grounded statute that was the first of its kind in the world.”¹⁴⁵ Indeed, this law does appear to actually codify and thus bring into material reality many notions which lie at the heart of a socially just and ecologically healthy world-narrative. In sharp contrast to the powerful devotion to liberal neutrality built in to the American system of justice,¹⁴⁶ the RMA is the overriding “law of the land” in New Zealand, that is, its dictates take precedence over all other legal and political decision-making. Its explicit purpose is to provide a legal mechanism (narrative) through which the overall long term-health and sustainability of an integrated human and non-human environment can be realized; and thus “[t]here is no pretense that the Act is ‘value-free’—on the contrary [the Act contains] a clear statement of and commitment to explicit values.”¹⁴⁷

An aspect of the act which deepens its interest to those involved in

¹⁴⁴ Alastair S. Gunn and Carolyn McCallig, “Environmental Values and Environmental Law in New Zealand,” *Ethics and the Environment* (2, (2); 103-120 (1997)).

¹⁴⁵ Ibid., p. 103.

¹⁴⁶ Another point about liberal neutrality and political liberalism is that it claims to privilege no one conception of “the good life”; in practice however, such a non-commitment to explicitly normative values on the part of the state can be shown to actually privilege the sort of laissez-faire capitalism and policy of governmental non-interference that seriously degrade natural (and cultural) environments.

¹⁴⁷ Ibid., p.118.

theorizing environmental law is that in drafting the RMA the government consulted widely with many groups, including the usual business and economic interests, but also, remarkably, with environmental philosophers and academics. Incorporated into the design of the law are notions of intrinsic worth and obligations to future generations, a not-so-minor miracle when one considers that these are the very notions that are decidedly (and often deliberately) underrepresented in conventional legal discourse and environmental policymaking. Thus the act has a “philosophical tone” and some of the most “central concepts and values in environmental ethics are built into the Act.”¹⁴⁸ The RMA is fluid, as is the emerging wetlands law with in the United States discussed in the previous section. As well, it explicitly recognizes the non-economic value of the environment. These features, like those of new directions in wetlands law, exemplify a postmodern and/or feminist approach.

One particularly remarkable feature of the RMA is its incorporation of Maori concepts and values. Since the recognition of voices of marginalized “others” is a defining aspect of both postmodern and feminist approaches, this feature alone locates the RMA as a model (but not a master) narrative for the development of an ecofeminist environmental jurisprudence.

The Maori are indigenous inhabitants of the island of New Zealand, and were subjugated by the British when New Zealand was colonized in 1840.¹⁴⁹ Although the Treaty of Waitangi was signed at that time, ostensibly recognizing a partnership between the British and the Maori and allotting Maori control of traditional lands, the treaty has been only spottily enforced

¹⁴⁸ Ibid., pp. 105-6.

¹⁴⁹ Ibid., p. 107.

until the enactment of the RMA.¹⁵⁰ The RMA, however, recognizes and gives statutory authority to many key Maori concepts, including the notion of *kaitiakitanga*, a term which for the purposes of the Act is taken to mean “The exercise of guardianship; and in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself.”¹⁵¹ Gunn and McCallig emphasize that this obligation to exercise stewardship in a manner consistent with the “natural character” of the land and which maintains its ecosystemic functioning is not an obligation imposed only on the Maori, but on “everyone who is exercising functions and powers under the act,”¹⁵² that is to say, everyone. Other Maori concepts incorporated into the act include a recognition of the importance of *waahi tapu* (sacred places), *taonag* (literally “treasure”; they are not limited to physical things but include practices and customs), and the ultimate authority of the *tangata whenua*, people of the land.¹⁵³

The ontological conception of the nature/culture interconnection contained in the RMA approximates the concept of ontological embeddedness which I argue must take a central role in the development of an ecologically sound and socially just environmental jurisprudence. Although termed the New Zealand *Resource Management Act*, the meaning of resources in the RMA is considerably broadened, to include “land, water, air, soils, minerals, and energy, all forms of plants and animals (whether native to New Zealand

¹⁵⁰ Ibid.

¹⁵¹ New Zealand Resource Management Act, section 2 and 7 (a); quoted in Gunn and McCallig p. 108.

¹⁵² Ibid.

¹⁵³ Ibid., p. 107. An interesting incidental from an ecofeminist perspective is that according to Gunn and McCallig, *whenua* means both “land” and “placenta.”

or introduced), and all structures’.”¹⁵⁴ Finally, the RMA adopts a “system perspective where the whole is recognized to be greater than the sum of its parts.”¹⁵⁵ Particularly interesting is the legislative history of this aspect of the RMA.

In the Resource Management Law Reforms discussions, problems such as pollution, soil erosion, species extinction, and deforestation were seen as stemming largely from the practice of managing land, air, and water separately...The Reform Group [The group responsible for the wording of the law] decided that to be effective, environmental policy should not limit itself to the consideration of ‘resources in isolation’; *environmental management is not just a matter of resource exploitation. The sustainability objective cannot be achieved by dividing the environment into separate resources To refer simply to the extraction of resources is to ignore the whole ecosystem from which the resource has come.... The whole ecosystem must be functioning effectively if resource flows are to be available at all. The result has been that in recent legislation and policy it has become almost impossible to distinguish between a ‘resource’ and ‘environment.’*¹⁵⁶

The concept of “environment” contained in the RMA is inclusive of humans— that is to say that human beings, in conventional environmental parlance, are considered to be “a part of” and not “apart from” the rest of the

¹⁵⁴ Ibid., p. 109.

¹⁵⁵ Ibid. This concept of resource management is clearly a far cry from the strongly anthropocentric “wise use” approach largely utilized in the United States.

¹⁵⁶ Ibid., p. 109 (emphasis added).

natural world. This makes the RMA consistent with Merchant's notion of a partnership ethic discussed in Chapter 3, as the needs and interests of human communities are accounted for within the requirements of the act, but human "needs" are interpreted to be those activities which promote long term ecological sustainability and "the more fundamental societal goal of quality of life for individuals and communities."¹⁵⁷ The act recognizes accordingly that "sustainability is achieved by minimizing resource depletion, environmental degradation, cultural disruption, and social instability."¹⁵⁸ The act in addition fits my definition of adhering to an ecofeminist perspective by not locating its purpose in any one foundational, universal goal or value, but rather recognizes that a plurality of values (including intrinsic ones) can justify the goal of ecological sustainability. It also perceives, in accordance with an ecofeminist understanding, that forms of oppression are interconnected, and acts upon this realization.

Conclusion: Making It Real

Though the RMA is not unproblematic, and undoubtedly has many challenges ahead to face as traditional economic interests experience the affect it has on their ability to conduct business-as-usual, it clearly represents an approach far more comprehensive than anything yet tried in the United States, and thus has enormous potential as a liberating ecological narrative. Although various proposals have been floated, including Merchant's "partnership ethic" and the new directions appearing in wetlands law, the state of contemporary environmental law in the United States is largely

¹⁵⁷ Ibid.

¹⁵⁸ Ibid. p. 110.

characterized by piece-meal and incoherent approach to promoting a sustainable relationship between human beings and the natural world. While plurality and a multiplicity of approaches is to be commended in some contexts, such as deciding on an ecologically and ethically permissible course of action for a particular human or non-human community, perhaps it is time for something resembling the New Zealand Resource Management Act to be instituted on a comprehensive basis within the United States. I must concur with Gunn and McCallig's belief that

For environmental ethics to make a difference, it needs to be incorporated into environmental law, just as an ethic of human rights found expression in the United States Civil Rights Acts. So far, environmental ethics has had little direct effect on legislation, despite the fact that it is over 20 years since Christopher Stone attempted to provide a basis for the legal protection of natural systems and places in terms of their intrinsic value. New Zealand environmental law thus provides a useful opportunity to study environmental ethics in practice.¹⁵⁹

Conclusion

The New Zealand Resource Management Act is, then, a story, which for we culture-dwelling storytellers perched on the cusp of postmodernity, facing the political and ecological exigencies of our time, is better than some others that can be told. Stories such as this one, which can be incorporated and echoed by environmental law, can lead us in the direction of sustainable

¹⁵⁹ Ibid., p. 105 (citation omitted).

ecological and social relations. Such relations would not be founded on oppression, separation, and exploitation but would be reflective of the understanding that we are ontologically engaged in deep connections with human and more-than-human others, and that oppressive discourses embraced by patriarchy can and must be dismantled. Law is one of the most potent means of change available to us accomplish this crucial task.

CONCLUSION

TAKING INTERDISCIPLINARITY SERIOUSLY

My purpose in the preceeding pages has been to confront with perhaps the aim of dissolving the disciplinary boundaries lying between the fields of philosophy, ecology, feminism, and law. In contemporary times, it is becoming increasingly recognized that fields of inquiry which refuse to acknowledge the interdependency of their epistemological and hermeneutic projects risk becoming ossified and parochialized, hazzard losing the influx of new combinations of ideas that ensure that they remain relevant and vital. In the case of liberatory discourses such as feminism, environmental philosophy, and jurisprudences that aim for social change, an active striving for interdisciplinarity is especially urgent and essential, as much more is at stake than simply the ability of a university department to maintain enrollment levels. If obsoletized, these disciplines will literally fail at the critically important endeavor of shifting the conceptual, institutional, and material structures of society toward health, equality, sustainablity and justice. Thus the disciplines I have engaged, characterized by their intent to not simply describe the world but also to *change* it, must especially make the attempt to reach out to other analyses, to synthesize alternate approaches, to make connections with fields and projects beyond their own.

It is widely acknowledged that environmental problems in particular cannot be solved with singular approaches: environmental issues stem from the complex interplay of history (including natural history), technology, and

culture, and they require for understanding and resolution the participation of those schooled in the sciences, philosophy, politics, literature, anthropology, communications, economics...the list goes on. Feminism too has learned quickly that the problem of women's subordination has no simple cause nor single solution, and feminists have been particularly adept at doing coalition work both within and outside of the academy. In fact, I feel confident in suggesting that feminism is perhaps more responsible than any other academic field for spreading environmental ideas throughout multiple discourses, since feminists themselves come from so many divergent disciplines and because cross-disciplinary dialogue is so central to feminist methodology and process.¹⁶⁰ But as with theorizing itself, the work is never done, and this thesis is an attempt to continue the dialogue between areas of research that is so necessary to solve our planet's ecosocial exigencies.

In this spirit of interdisciplinarity, what I have done here in a general sense is to explore the relationship law and gender have to philosophies of the environment and human ecology. Since environmental law as it is currently applied is largely driven by the way in which science takes the natural world to be, taking this work further, as I hope to do in a dissertation, would show even more directly the ways in which scientific knowledge of natural systems is shaped by anthropocentric conceptions of the nature/culture relationship,

¹⁶⁰ For example, in conducting my research for this thesis and for the classes which I have taught, especially a course in Feminist Political Philosophy, I have found repeated reference, both directly and more generally, to the fundamental ideas of environmental ethics and ecofeminism, including notions of intrinsic worth for nature, within feminist writings from many sources. To the extent that various discourses incorporate feminist perspectives (as is certainly becoming the trend within the academy), and to the extent that feminists incorporate environmental perspectives (which as I have observed, is being done actively and consistently), environmental ideas will continue to proliferate and infuse the thinking of many researchers and theorists. What is especially heartening in this regard is that feminist theorists are most likely to connect environmental problems with other issues of social and political justice.

how modernist and foundationalist assumptions occurring within philosophy, science, and law intersect with and contribute to race, class, gender, and ecological oppression, and the role language plays in shaping consciousness of such things. But while I have asked in this thesis how the institutions and expressions of modernity reinforce the sorts of value systems which produce anthropogenic environmental degradation, I also have explored the potential institutions have for introducing important notions into the social discourse which may promote change in the way we relate to human and more-than-human others. Law, built though it may be upon premises that reinforce the western, male, capitalist status quo, *does* have radical potential, and raising awareness of the divergent ubiquity of various forms of oppression “shifts the episteme...exposing the political behind the personal, the dominance behind the submission, participating in altering the balance of power subtly but totally.”¹⁶¹ Finding and exploiting these openings within our own political systems is important, because once the “cracks and fissures”¹⁶² are penetrated law can function as a positive feedback system which, like other non-linear systems, will dialectically pick up, alter, re-translate, and send back out cultural messages which then become re-coded through other legal mechanisms, thus amplifying the message and sending echoes and throughout the entire system. Change happens more quickly each time with each new reverberation, and for this reason narratives that encourage ecological health must be explicitly connected to other efforts to

¹⁶¹ MacKinnon, *Toward a Feminist Theory of the State*, p. 240.

¹⁶² Nancy Hirschman, “Revisioning Freedom: Relationship, Context, and the Politics of Empowerment” in *Revisioning the Political: Feminist Reconstructions of Traditional Concepts in Western Political Theory*, eds., Nancy J. Hirschmann and Christine Di Stefano (Boulder: Westview, 1996).

alter the master narratives of domination and exploitation, since, as I have argued, forms of oppression are linked, and are thus repudiated in similar (but not identical) ways.

I have intended the overarching theme of this thesis to be the way in which law is a carrier of stories that can both hinder and enhance the promotion of ecological ideas in society, and how ecofeminism can contribute to the transformative projects of both environmental philosophy and feminist law. This argument has had two major prongs, one critical and one constructive. Carolyn Merchant asserts that “[s]cience is an ongoing negotiation with nonhuman nature for what counts as reality”¹⁶³ By extension, disciplines such as political philosophy and jurisprudence are also negotiations between society and its observers (who are of course participants in that society also—there is no “view from nowhere”) for what counts as social reality. Thus my *critical* task has been to delineate the ways in which institutions of modernity (such as law and science) have precipitated ecosocial crisis through the attempt to dialectically enforce mastery and control over nature and women. My *constructive* task has been to explore alternate political ontologies, such as the one proffered by socialist feminism, which challenge the classical liberalist view of the (human) individual as a radically isolated, discrete, autonomous being. Ecofeminism and environmental ethics suggests that we exist in relationship and that humans—like other processes and entities occurring within nature—possess an ontology not of separation but of interconnection. This understanding of being I have defined as an ontology of embeddedness, and I have argued that this insight is shared by feminist

¹⁶³ Carolyn Merchant, *Ecological Revolutions* (Chapel Hill: University of North Carolina Press, 1989), p. 4.

jurisprudentialists that can be combined with ecofeminism in such a way as to revision the ideas and assumptions which inform environmental law.

Catharine MacKinnon has said that “a feminist theory of the state has barely been imagined, systematically, it has never been tried.”¹⁶⁴ So too has a theory of environmental jurisprudence which takes seriously the insights of ecofeminism (or even of environmental ethics) barely been imagined, and never (except in New Zealand!) systematically tried. It is time to rectify this. Law under liberal premises objectifies women, supports narrow, eco-destructive economic interests under the guise of rational neutrality, treats nature as a resource, and distances humans from the other-than-human-world in which we are embedded. Socialist feminist ontological premises, which contain assumptions about human nature which put us firmly in this world and in direct, necessary, and fulfilling contact with human and earth others can and should be actively incorporated into our legal and political institutions. A scattered number of examples—the New Zealand Resource Management Act, wetlands law—exist which incorporate principles consistent with an ecofeminist perspective, and these should be investigated, the insight and information they contain gleaned for application to other cases and policies.

I will close by stating that I think it true that the words of MacKinnon, regarding the predicted doom of a feminist jurisprudence, apply equally to an ecofeminist environmental jurisprudence: “It will be said that [eco]feminist law cannot win and will not work. But this is premature. Its possibilities cannot be assessed in the abstract but must engage the world.”¹⁶⁵

¹⁶⁴ MacKinnon, *Toward a Feminist Theory of the State*, p. 249.

¹⁶⁵ Ibid.

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